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WISCONSIN REPORTS

131

c/

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

FEBRUARY 19—MAY 21, 1907

FREDERIC K. CONOVER
OFFICIAL REPORTER

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1908

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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Ex officio CHIEF JUSTICE
JOHN B. WINSLOW
ROUJET D. MARSHALL
JOSHUA ERIC DODGE
ROBERT G. SIEBECKER
JAMES C. KERWIN
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Attorney General - - FRANK L. GILBERT

Clerk - - - CLARENCE KELLOGG

ERRATA.

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Page 709. Under Statutes of 1898, insert Section 2609a - - 261

Vol. 118.

Page 662. Par. 3, line 3. For 3682, read 3862.

Vol. 131.

Page 356, line —2. For 66 Wis. 504, read 66 Wis. 604.
" 439, " 13. For 78 Wis. 547, read 78 Wis. 457.
" 479, " —5. For 14 Wis. 151, read 14 Wis. 157.

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CASES DETERMINED

AT THE

January Term, 1907.

WASHBURN LAND COMPANY, Respondent, vs. SWANBY, Appellant.

January 30—February 19, 1907.

Deeds: Acknowledgment before notary public in another state: Certificate: Ejectment: Tax titles: Inchoate right of dower: Defects in tax proceedings: Conditional order for judgment: Amount to be paid to defendant.

1. The acknowledgment of a deed taken by a notary public outside of this state and certified to in substantially the form prescribed by our statutes, with the impression of his seal, is sufficient to make the deed admissible in evidence in an action in this state, without having annexed thereto an additional certificate that the notary public was such officer.
2. The existence of an inchoate right of dower in the wife of a former owner of land does not preclude the present owner from recovering possession of the land in an action of ejectment against a tax-title claimant.
3. Where plaintiff in ejectment is entitled to recover by reason of defects in the tax title under which defendant claims, the direction and order for judgment should follow the statute, sec. 3087, Stats. (1898), and should determine the amount to be paid by plaintiff to defendant as a condition of judgment in plaintiff's favor.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action of ejectment brought by the plaintiff as the original owner in fee simple to recover possession of three lots described, unlawfully withheld by the defendant since May 1, 1905, to the plaintiff's damage in the sum of $500.

The defendant answered by way of a general denial and by way of counterclaim, alleging in effect that he has been in possession since April 28, 1905, holding adversely to the plaintiff and its grantors by title founded upon a certain tax deed duly issued to the defendant April 28, 1905, and recorded May 2, 1905, for the nonpayment of taxes of 1900 and tax sale of May 21, 1901; and prayed judgment dismissing the action, with costs, and that, if the plaintiff's title is adjudged to be paramount, then that the defendant's claim for taxes be tried and the amount assessed and adjudged to him, less any damages that may be awarded to the plaintiff. The plaintiff, replying to the counterclaim, alleges in effect that such tax deed is illegal and void for several reasons therein particularly alleged, which are mentioned in the findings of the court.

A trial by jury having been expressly waived by the parties and the cause tried upon the issues joined, the court at the close of the trial found as matters of fact, in effect, (1) that all the allegations of the complaint are proven and true; (2) that the deed mentioned and described in defendant's counterclaim is illegal and void for the following reasons: (a) That the return of the town treasurer for the year in which said taxes were levied and assessed is illegal and void, in that he failed and neglected to subscribe his name at the end thereof or annex the affidavit thereto, as required by law; (b) that the town treasurer for said year failed and neglected to compare the stub book receipts with the tax roll of said town for the said year, and to certify on such stub receipt book that he had made the comparisons as required by law; (c) that the tax sale upon which said deed is based is illegal and void, in that the county treasurer sold the lands described in said deed for a greater sum than was due for taxes, interest, and charges; (d) that the county treasurer failed and neglected to file affidavit of the posting of the statement and notice of tax sale as required by law; (e) that said tax deed is illegal and void, in that no affidavit of the printer or fore-

man printer of the publication of the statement and notice of sale was ever made and filed, as required by law, for the year in which said lots were sold.

As conclusions of law the court found, in effect, (1) that the plaintiff is the owner in fee simple of the premises described in the complaint and that he is entitled to the possession thereof; (2) that the tax deed described in the counterclaim is illegal and void; (3) that before the entry of judgment, and within thirty days, the plaintiff pay into court for the use of the defendant the amount for which said lands were sold, together with interest thereon at the rate of fifteen per cent. per annum from the date of the transfer from Bayfield county, together with all subsequent costs and charges, subject, however, to the right of the plaintiff to offset against said sums the amount of the costs and disbursements of this action. Judgment was ordered to be entered accordingly. Thereupon judgment was entered by the clerk, wherein it was adjudged that the plaintiff have and recover of the defendant, *O. P. Swanby,* the possession of the premises described in the complaint, and that the plaintiff also have and recover of the defendant the sum of $34.18, costs and disbursements, less the aforesaid sum of $14.84, to wit, the sum of $19.34. From that judgment the defendant appeals.

John Walsh, for the appellant.

A. W. McLeod, for the respondent.

Cassoday, C. J. Exception is taken to the admission in evidence of a certain deed in the plaintiff's chain of title. It appears and is undisputed that the deed mentioned was executed in the presence of two subscribing witnesses and acknowledged by the grantors, outside of this state, before a notary public, who certified to the same substantially in the form prescribed by our statutes, and made the impression of his official seal as such notary public upon the instrument. The trial court held that under our statutes such acknowledgment was sufficient, and hence that such deed was properly ad-

missible in evidence without having annexed thereto an additional certificate to the effect that such notary public was such officer. Secs. 2216, 2217, 2218, 2219, Stats. (1898). We find no error in such ruling.

It is further claimed that the quitclaim deed of two of the lots in question from Frank B. Clark and wife to D. M. Maxcy, in the plaintiff's chain of title, was defective because it was not signed nor acknowledged by Mr. Clark's wife personally, but only by her attorney in fact, without any proof that she had given any power of attorney; and hence that the evidence failed to show that the plaintiff was the owner of the premises in fee simple. The claim is that it appears from the evidence that Mrs. Clark has an inchoate right of dower in such lots, and hence that the findings in that regard are not supported by the evidence, nor equivalent to the requirements of the verdict prescribed in actions of ejectment. Sec. 3084, Stats. (1898). That section declares, among other things, in effect, that, if it be shown on the trial that the plaintiff has "a right to recover the possession of the premises, the verdict in that respect shall be for the plaintiff." Id. Had Mr. Clark been a resident of this state at the time of executing the deed, still Mrs. Clark would never have any right of dower in the lots unless she happens to survive her husband—an event which may never occur. Such mere inchoate right of dower cannot prevent the plaintiff, claiming under the grantee of the husband, from recovering the possession of the lots. It follows from what has been said that the plaintiff is entitled to recover possession of the premises described unless defeated by the tax deed.

The trial court found, and it is conceded by counsel for the defendant, that the tax deed is void for irregularities not going to the groundwork of the tax upon which the deed was based. Such being the fact, the only substantial difference between the parties is as to the amount the plaintiff was required to pay as a condition of relieving the premises from the tax deed and tax certificates in question. Such amount is

not determined by the findings of the court. The circumstances are peculiar. It seems to be conceded that the cost of executing the tax deed was $107.80 and that the cost of recording the same was $11. But it is also conceded that such tax deed contains more than 300 descriptions, whereas the title to only three lots is in controversy in this action. The defendant contends that he is entitled to receive, among other items, the full amount of the costs of executing and recording such tax deed. The plaintiff contends that he is only required to pay, to relieve the three lots in question, the proportionate share of such costs. The questions are not determined by findings nor the judgment. It does appear that the tax deed was based upon three certificates issued on the tax sale of May 21, 1901, for the three lots in question for the aggregate amount of $11.79. Neither the direction for judgment made by the court nor the judgment entered by the clerk is in accordance with the statute applicable, which provides that "the court shall order that the amount for which such land was sold, and the costs of executing and recording such tax deed, and the amount paid by the defendant for taxes assessed upon such premises subsequent to said sale, with interest on all such sums at the rate of fifteen per centum per annum from the time so paid until the date of verdict, shall be set off against the damages awarded to the plaintiff by the verdict; and if there be any excess, that the plaintiff, as a condition of judgment, shall pay the same, with interest from the date of the verdict, within ninety days; and that, in default thereof, the defendant shall have judgment in the action." Sec. 3087, Stats. (1898).

The direction for judgment contained in the conclusion of law omits entirely several of the requirements contained in the portion of the section thus quoted, and limits the payment to the amount for which the lands were sold, with interest and subsequent costs and charges, subject to the right to offset costs and disbursements. It also requires payment "within thirty days," instead of "within ninety days," as prescribed in the statute. The requirements of the conditional

order for judgment under that statute have frequently been stated by this court and need not be reiterated here. *Chippewa River L. Co. v. J. L. Gates L. Co.* 118 Wis. 345, 347 (11), 358, 94 N. W. 37, 95 N. W. 954. See, also, *Pinkerton v. J. L. Gates L. Co.* 122 Wis. 471, 100 N. W. 841; *Stephenson v. Doolittle,* 123 Wis. 36, 37 (7), 100 N. W. 1041; *Gilbert v. Pier,* 103 Wis. 331, 79 N. W. 215; *Cook v. McComb,* 98 Wis. 526, 74 N. W. 353. Obviously the amount to be paid must be determined by the court before the plaintiff can be required to make payment. The payment is to be made "as a condition of judgment." In default of such payment the defendant is to "have judgment in the action." In the case at bar the judgment entered by the clerk does not conform to the statute nor follow the direction in the conclusions of law, but is in form a final judgment, awarding costs in favor of the plaintiff and against the defendant, subject to setoff, instead of being an interlocutory order or judgment, as mentioned in *Maxcy v. Simonson,* 130 Wis. 650, 110 N. W. 803. Of course, the rights of the parties are fixed by the statute, and the judgment must conform to the statute.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

MAXCY LAND COMPANY, Respondent, vs. SWANBY, Appellant.

January 30—February 19, 1907.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

John Walsh, for the appellant.

A. W. McLeod, for the respondent.

CASSODAY, C. J. The facts in this case are substantially the same as in *Washburn Land Co. v. Swanby, ante,* p. 1, 110 N. W. 806. In pursuance of the stipulation of the parties in this case and the de-

cision in that case, the judgment of the circuit court in this case is reversed, and the cause is remanded for further proceedings according to law.

By the Court.—Ordered accordingly.

MAXCY, Respondent, vs. SWANBY, Appellant.

January 30—February 19, 1907.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

John Walsh, for the appellant.

A. W. McLeod, for the respondent.

CASSODAY, C. J. The facts in this case are substantially the same as in *Washburn Land Co. v. Swanby, ante*, p. 1, 110 N. W. 806. In pursuance of the stipulation of the parties in this case and the decision in that case, the judgment of the circuit court in this case is reversed, and the cause is remanded for further proceedings according to law.

By the Court.—Ordered accordingly.

McGEORGE and others, Appellants, vs. STANTON-DE LONG LUMBER COMPANY, imp., Respondent.

January 31—February 19, 1907.

Liens: Logs and lumber: Hauling: "Timber:" Labor partly lienable.

1. Sec. 3329, Stats. (1898), does not give a lien for the amount due for labor or services in hauling manufactured lumber from the mill to market.
[2. Whether larger timbers, other than boards and planks, manufactured from the logs, should be classed as "timber" for the hauling of which a lien is given, not determined.]
3. Where a lien is claimed for the amount due for labor, part of which is lienable and part not lienable, and there is no proof produced so that the one can be separated from the other with reasonable certainty, the entire claim for a lien must be denied.

APPEAL from a judgment of the circuit court for Sawyer county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action to recover on contract and to enforce a lien under sec. 3329, Stats. (1898).

The complaint was to the effect that plaintiffs, between certain specified dates, performed services for the defendant Keene of the value of $464.74, hauling lumber and timber at an agreed price per thousand feet, which lumber and timber belonged to the defendant *Stanton-De Long Lumber Company;* that no part of said sum has been paid, and that plaintiffs have complied with all the statutory requisites to secure a lien for said sum on such lumber and timber, the various statutory steps to that end being appropriately alleged.

The lumber company answered putting in issue the allegation that timber was hauled by the plaintiffs and raising the question of whether the claim was lienable.

On the trial the evidence was uncontroverted that most of the manufactured product hauled by the plaintiffs was boards and the balance 4x4s, 6x6s, 6x8s, and plank, no evidence being produced as to the amount of such stuff; that all the product was manufactured from saw logs at a small mill located about fourteen miles from the village of Hayward in Sawyer county, Wisconsin; that part was piled in the mill yard, and that plaintiffs hauled that and the balance, taking the latter from the tail of the mill, to the railroad station at said village of Hayward and placing the same on the right of way of the railway company at such station.

The jury rendered a verdict in favor of the plaintiffs for the amount of the claim as alleged, and rendered a directed verdict that plaintiffs were not entitled to a lien therefor. Judgment was rendered accordingly, from which this appeal was taken.

F. L. McNamara, for the appellants, as to the meaning of the word "timber" in sec. 3329, Stats. (1898), cited *Babka v. Eldred,* 47 Wis. 189, 192.

J. F. Riordan, for the respondent, contended that the statute giving a lien for cutting, hauling, etc., logs, timber, etc., refers to the forest product in its crude condition, and that it gives no lien for hauling manufactured lumber or timbers from the mill to a railway depot for shipment. *De Morris v. Wilbur L. Co.* 98 Wis. 465, 473; *Carpenter v. McCord L. Co.* 107 Wis. 611, 617; *Kendall v. Hynes L. Co.* 96 Wis. 659, 662; *Villenuve v. Sines,* 92 Mich. 556, 52 N. W. 1007.

MARSHALL, J. The sole question presented in this case is: Were plaintiffs entitled to a lien for their services in hauling the manufactured products from the sawmill to the village of Hayward, under sec. 3329, Stats. (1898), providing that "any person who shall do or perform any labor or services in cutting, hauling, running, felling, piling, driving, rafting, booming, cribbing, towing, sawing, peeling or manufacturing into lumber or timber any logs, timber, stave-bolts, staves, pulp wood, cordwood, railroad ties, piling, telegraph poles, telephone poles, fence posts, paving timber, tan or other barks, or in preparing wood for or manufacturing charcoal shall have a lien upon such material for the amount due or to become due for such labor or services. . . ."

The language of the statute provides for a lien upon lumber "material" for the labor of producing the same from saw logs. Otherwise no lien is given thereon. The complete process of manufacturing logs into lumber ordinarily includes the work of placing the lumber in the sawmill yard in piles but not that of transporting the same from the yard to market. Such process is ended at the point in the mill yard from which it is designed that the lumber shall be taken to enter into consumption. That seems unmistakable without the aid of any judicial authority, but it has elsewhere been so held as indicated by *Villenuve v. Sines,* 92 Mich. 556, 52 N. W. 1007, cited to our attention by respondent's counsel. Appellants' counsel refer to *McGinley v. Laycock,* 94 Wis. 205, 68 N. W. 871, as an instance where work of hauling lumber was recog-

nized as lienable. That is a mistake. No question as to the lienable character of such work was there involved; the plaintiff's work was all performed on the lumber in the mill yard and no part of it consisted in hauling lumber.

If there is any distinction between hauling timber and hauling lumber manufactured from saw logs as regards the lienable character of the work, and if the product in question other than boards and planks should be classed as timber, it is immaterial in this case since there was no proof as to the amount of such timber. Where a lien is claimed for the amount due for labor, part of which is lienable and part not lienable, and there is no proof produced so that the one can be separated from the other with reasonable certainty, the entire claim for a lien must be denied. *Glover v. Hynes L. Co.* 94 Wis. 457, 69 N. W. 62.

By the Court.—The judgment is affirmed.

MISSISSIPPI RIVER LOGGING COMPANY, Respondent, vs. BLUE GRASS LAND COMPANY, Appellant.

February 1—February 19, 1907.

Vendor and purchaser of land: Bona fide *purchasers: Notice of unrecorded deed.*

1. Defendant's grantor, a corporation, knowing that there was no recorded conveyance of the title of H., a former owner of certain parcels of unoccupied land, but that other persons were executing conveyances thereof as if they owned them, obtained from the heirs of H. a quitclaim deed of the lands for a nominal consideration, the agent of the corporation falsely representing to said heirs that H. had lost his title by failure to pay taxes, and the heirs stating that they had no title. *Held*, that the corporation had information sufficient to put an ordinarily prudent man upon inquiry as to the rights of those claiming under a prior unrecorded conveyance from H., and was therefore not a *bona fide* purchaser.

2. When the defendant, also a corporation, purchased said lands it knew that they had been conveyed to said H. by one C. by warranty deed for a substantial consideration, and that C. had afterwards taken tax deeds thereof based on tax sales made prior to his conveyance to H.; that C. had thereafter quitclaimed the lands to W., and that W. had conveyed them to plaintiff by warranty deed for ample consideration; that ten years later its grantor had obtained apparent title by quitclaim from the heirs of H. for a nominal consideration; that the lands were valuable; and that since the quitclaim deed from C. to W. the taxes had been regularly paid. It appears that inquiry made of W. would have disclosed the existence of an unrecorded deed from H. to W. *Held*, that defendant was chargeable with notice of such unrecorded deed.

APPEAL from a judgment of the circuit court for Vilas county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

This is an action brought by the grantor in a warranty deed to remove a cloud from the title of fifteen parcels of unoccupied land in Lincoln county, of which eleven parcels are forty-acre tracts and the balance fractional lots. Both parties claimed title under John Comstock, who acquired a valid title to the lands by tax deed on the sale of 1878, dated and recorded June 4, 1881. It appears that April 7, 1882, Comstock and wife executed a warranty deed of the lands in question, with twenty other descriptions, to Frank D. Harding, which deed recited a consideration of $4,100 and was recorded April 10, 1882. After making this deed Comstock took three other tax deeds—one in 1882 on the sale of 1879, one in 1883 on the sale of 1880, and one in 1884 on the sale of 1881, all of which were seasonably recorded. It further appears from the record in the register's office that Comstock deeded this land with a large number of other parcels to the Wisconsin River Land Company for a consideration recited of $15,000 by quitclaim deed dated February 18, 1885, and recorded December 17, 1885; that the Wisconsin River Land Company deeded the lands in question to the plaintiff for a consideration averaging $236.66 a description by warranty

deed dated November 3, 1892, and recorded November 25, 1892.

Thus the record title stood in February, 1902, when the Home Investment Company (defendant's grantor) contracted in writing to convey to the defendant about 40,000 acres of unoccupied land for the uniform price of $2.50 an acre, abstracts to be furnished and deeds delivered within ninety days thereafter. Whether the lands in question were included in this contract is not certain. No deed from Frank D. Harding or his heirs appeared in the records at this time, nor did the Home Investment Company have actual knowledge that any deed had been made by him; but it appears as matter of fact that Harding and wife on the 28th of June, 1886, conveyed the lands in question with others (being the same lands conveyed to him by Comstock) to the Wisconsin River Land Company for a consideration of $7,000 by a deed with warranty against his own acts, which deed, however, was not recorded until July 20, 1903.

The Home Investment Company was a corporation dealing in northern Wisconsin lands and tax titles, and through its president had access to a tract index of the lands in question and had knowledge that other parties than Harding or his heirs were making conveyances of the lands in question and assuming to deal with them as owners. In March, 1902, the Home Investment Company sent an agent to Hudson, Wisconsin, to obtain a quitclaim deed of the lands in question from the heirs of Harding (the deceased intestate). This agent succeeded in obtaining a quitclaim deed from the heirs covering all the lands deeded by Comstock to Harding for the sum of $200. The court found on sufficient evidence that he obtained this deed by representing to the heirs that their father had owned these lands in his lifetime, but had not paid taxes on them for twenty or thirty years, and that now they had really no interest in them, and, further, that the Home Investment Company was in fact the owner and expected to sell

them to some eastern party who wanted the title cleared in this way. The court also found that the heirs told the agent at that time that they did not think or consider that their father had any interest in the lands. In August, 1902, the Home Investment Company deeded the lands in question to the defendant by warranty deed as a part of the lands contracted for in February, and soon after furnished an abstract of title which was examined by the defendant's attorney and which showed the deeds before described which were on record in February, 1902, with the addition of the deed from the Harding heirs. No part of the consideration was paid prior to the examination of the abstract. This deed recited a consideration of $2.50 an acre, which was in fact the fair value of the land and known to be such by both parties. It was recorded September 30, 1902. The deed from Harding to the Wisconsin River Land Company was not recorded until the 20th day of July, 1903, having been kept prior to that time in the office of the company at Eau Claire, Wisconsin, where it could have been found had inquiry been made for it. From 1886 up to November, 1892, the Wisconsin River Land Company paid all the taxes on the lands in question, and from November, 1892, up to the time of the commencement of this action the plaintiff paid such taxes, and the fact that such payments were duly made appears in the proper town and county offices. The plaintiff conveyed the lands by warranty deed to the Chippewa Lumber & Boom Company prior to the commencement of this action.

On these facts the court found that both the Home Investment Company and the defendant had notice of facts which should have put them upon inquiry as to the existence of the unrecorded deed, which inquiry would have resulted in its discovery, and that for this reason neither of them was a purchaser in good faith, and that the Chippewa Lumber & Boom Company was the owner in fee simple. Judgment being entered in accordance with this finding, the defendant appeals.

A. W. Sanborn, for the appellant.

For the respondent there was a brief by *Reid, Smart & Curtis,* attorneys, and *Neal Brown,* of counsel, and oral argument by *R. M. Smart.*

WINSLOW, J. The only question presented which is deemed necessary to be considered is whether the defendant is in the position of a purchaser in good faith without notice of the prior unrecorded deed from Harding to the Wisconsin River Land Company.

The principle is well understood that one who purchases with knowledge of an outstanding claim of title or information sufficient to put an ordinarily prudent man upon inquiry is not a *bona fide* purchaser. *Prickett v. Muck,* 74 Wis. 199, 42 N. W. 256. We can entertain no doubt that the Home Investment Company had such information. It knew of the deed from Comstock to Harding, executed in 1882, by which these lands with twenty other descriptions had been conveyed for $4,100. It had access to a tract index of the title. It knew that as far as the records showed Harding had never conveyed his title and that other parties were executing conveyances of the lands as if they owned them. In this situation it sent an agent to the heirs of Harding to obtain a quitclaim deed from them for a practically nominal consideration, and that agent stated to the heirs that their father had no title, and the heirs confirmed that statement. This amounts to a confession that the title sought was not a real title but only a nominal one. It demonstrates beyond cavil that the company knew that it was buying a purely speculative title which had only the appearance of validity. The fact that it was buying for $200 lands less than half of which it proposed at once to transfer to others for $1,500 and which were in fact worth the latter sum only adds certainty to the conclusion that it knew facts entirely discrediting the title which it was getting. It can hardly say now that it knew

no fact in May, 1902, tending to throw doubt on the Harding title, when it appears that it then bought that title for a song on the statement that it was worthless.

As to the defendant the conclusion is the same, although the facts are somewhat different. Its attorney had examined the abstract before the consideration money was paid. By this examination it was informed of the deed from Comstock to Harding in 1882 by which thirty-five descriptions were conveyed for a consideration of $4,100; also of the subsequent tax deeds taken by Comstock and his quitclaim to the Wisconsin River Land Company in 1885; also of the warranty deed of the last-named corporation to the plaintiff by which the lands in question were conveyed for an average consideration of $236.36 a description; and it was also informed of the quitclaim deed ten years later by the Harding heirs to the Home Investment Company by which it obtained apparent title to said thirty-five descriptions for a consideration of $200 or about $5.70 a description. It knew also that the taxes had been regularly paid or redeemed by some one, that the lands were actually worth $1,500, and that it was about to pay that sum for them. Surely these facts were ample to suggest a robust doubt as to the validity of the Harding title. Here is no question of constructive notice of a collateral deed not in the chain of title, but the question is as to the effect of actual knowledge of the fact that other persons not in the apparent chain of title have been deeding the land as if they were owners for substantial considerations, in connection with the fact that the apparent title is based on a quitclaim deed executed but yesterday for a nominal consideration.

The defendant's attorney, of course, knew the general legal proposition that the after-acquired title of a grantor in a warranty deed inures to the benefit of his grantee; hence he knew that apparently the tax deeds subsequently taken by Comstock were merely so many additional supports to the Harding title. Nevertheless he saw by the abstract that Comstock assumed

to quitclaim his subsequently acquired title to the Wisconsin River Land Company, which company thereafter deeded the land by warranty deed for ample consideration to the plaintiff. Here, too, was certainly an unusual circumstance well calculated to stir the prudent mind to inquiry.

The mere recording of a deed of lands is an assertion of title. Sec. 3186, Stats. (1898); *Maxon v. Ayers,* 28 Wis. 612; *Broderick v. Cary,* 98 Wis. 419, 74 N. W. 95. Actual knowledge that a stranger to the chain of title has placed a deed of the land on record is held to be sufficient to put an intending purchaser on inquiry, especially if the title which he is about to purchase appears to have been acquired for a merely nominal consideration. *Dillon v. Shugar,* 73 Iowa, 434, 35 N. W. 509; *Knapp v. Bailey,* 79 Me. 195, 9 Atl. 122; *Clark v. Holland,* 72 Iowa, 34, 33 N. W. 350; *Doran v. Dazey,* 5 N. Dak. 167, 64 N. W. 1023, 57 Am. St. Rep. 550. In the present case it appears that an inquiry made of the Wisconsin River Land Company at its office would have resulted in the finding of the missing deed and the explanation of the singular state of the record. The defendant chose to make no such inquiry, and must abide the results.

By the Court.—Judgment affirmed.

IDEMA, Trustee, Respondent, vs. COMSTOCK, Appellant.

February 1—February 19, 1907.

Appeal: Findings of fact by referee: Partition of land: Sale.

1. The decision of a referee, confirmed by the circuit court, as to a pure matter of fact will be given the same dignity, on appeal, as any conclusion of fact by a trial court.
2. The test as to whether a partition of lands in kind would result in "great prejudice to the owners," within the meaning of sec. 3119, Stats. (1898), is whether the value of the share of each would be materially less than his share of the money which could probably be obtained on a sale of the whole.

3. The finding of a referee that partition in kind of two forty-acre tracts of timber land between two persons, one owning a two-thirds and the other a one-third interest, could not be made without great prejudice to the owners, is *held* not to be against the clear preponderance of the evidence.

APPEAL from a judgment of the circuit court for Vilas county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

The appeal is from an order confirming the report of a referee in an action for partition of real estate and directing a sale of the premises.

The action was brought for the partition of the northeast quarter of the southeast quarter and the southwest quarter of the southeast quarter of section number twenty (20), township number forty-four (44) north, of range number five (5) east, in Vilas county, Wisconsin, the plaintiff being the owner of an undivided two-thirds interest and the defendant *J. M. Comstock,* as appeared by the pleadings, being the owner of an undivided one-third interest. The only contest was as to whether the property could be partitioned between the parties without a sale of the same, plaintiff affirming that such sale was necessary and the said defendant that it was not. Such proceedings were duly had that an order for a partition of the property was made and the controversy as to whether a sale was necessary in order to make such partition was duly referred to George Hart, in compliance with sec. 3110, Stats. (1898). Such proceedings were duly had in execution of the reference that a report was made to the court that the premises were so situated and of such character that a partition thereof could not be made without great prejudice to the owners. The finding on the question of fact was excepted to by the defendant. The court confirmed the referee's decision and directed a sale of the premises, and defendant appealed.

The cause was submitted for the appellant on the brief of *E. G. Comstock,* attorney, and *J. H. Roemer,* of counsel.

A. W. Sanborn, for the respondent.

MARSHALL, J. The sole question here is this: Is the finding of the referee, that neither the premises nor any distinct portion thereof is so situated that a partition thereof can be made without great prejudice to the owners, against the clear preponderance of the evidence?

The subject with which the referee had to deal was a pure matter of fact, therefore his decision, confirmed by the circuit court, must be given the same dignity on appeal as is required by the established practice as to any conclusion of fact made by a trial court.

True, as argued by counsel for appellant, the judicial rule of long standing is that a sale should not be made for the purposes of partition unless that is necessary in order to protect the parties from serious loss. That rule was developed and established in equity. 4 Pomeroy, Eq. Jur. (3d ed.) §§ 1387, 1390. We need not investigate the decisions in that field because the equitable rule has been made a matter of written law providing for a sale for the purposes of partition only when a partition in kind would result in "great prejudice to the owners." Sec. 3119, Stats. (1898). The term "great prejudice to the owners" refers to pecuniary loss. That was the view taken in *Vesper v. Farnsworth,* 40 Wis. 357, where a guide is found for administering the statute, phrased thus: The court should "ascertain whether, if the premises be partitioned, the value of the share of each owner will be materially less than his or her probable share of the purchase money in case the premises are sold. If so, a sale will be proper, for the injury which will warrant a sale we understand to be a pecuniary injury." So the established test of whether a partition in kind would result in "great prejudice to the owners" is whether the value of the share of each in case of a partition would be materially less than his share of the money equivalent that could probably be obtained for the whole.

An examination of the evidence satisfies us that the referee,

and the trial court in confirming the former's report, applied the law as above indicated. The evidence was directed to the situation of the property and its physical characteristics, necessarily controlling the question of whether it was practicable to divide the same between the parties according to their respective interests, giving to each his share, quantity and quality relatively considered, without materially lessening the money value of the several interests. Our examination of the evidence also satisfies us that the referee and the court appreciated the rule that the burden of proof to establish the statutory requisite to a sale was on the party alleging the same. So, as indicated at the outset, the case comes down to the simple proposition of whether the decision complained of has sufficient support in the evidence that it cannot be rightly said to be contrary to the clear preponderance thereof.

It does not seem that we should recite the evidence in detail in this opinion for the purpose of demonstrating the correctness of the conclusion to which we have arrived. Such demonstration it is thought should be avoided where there are no special circumstances calling therefor. There are none in this case. Several witnesses were examined and cross-examined. All of them were called by the respondent. The general effect of their evidence is that the two forties of land are located at a considerable distance from any settlement; are chiefly valuable for the timber thereon; that a partition between the parties would result in one becoming the owner of one and a fraction of a forty-acre tract, the other the possessor of a small fraction of such a tract; that such fraction would not be, under the circumstances characterizing the land in question, ordinarily salable at the full value which it would represent as a part of a considerable body of land; that large bodies of land are more salable than small ones; and that a mere small fraction of a government subdivision, except in special circumstances, is not salable at all. The evidence in the whole has been carefully examined, and though, it is true,

the necessity for a sale is not as definitely established as one would like to see in such a case, it is not without merit to an extent warranting us in holding that the finding complained of is against the clear preponderance of the evidence.

By the Court.—The judgment is affirmed.

TIMLIN, J., took no part.

SALTER, Respondent, vs. COOK and others, Appellants.

February 1—February 19, 1907.

Courts: Jurisdiction: Setting aside one another's orders: Incorporation of villages.

An order incorporating a village, made by one circuit court under secs. 854–866, Stats. (1898), cannot be declared void or proceedings thereunder restrained in an action brought in another circuit court. The remedy, if any, is to be sought in the court in which the proceedings were instituted or upon appeal.

APPEAL from an order of the circuit court for Clark county: E. RAY STEVENS, Judge. *Dismissed.*

It appears from the record and is undisputed that, pursuant to the requisite application made to the circuit court for Marathon county in 1904 for the incorporation of the village of Unity, comprising the territory therein described, the same being partly in the county of Marathon and partly in the county of Clark, proceedings were had therein, and, after hearing the matter, the circuit court for Marathon county, on March 14, 1905, found as matters of fact that such territory contained a population of more than 400 inhabitants who were residents in good faith therein, and that said territory had an area of one square mile, and that no territory was improperly included in said village. As conclusions of law that court de-

termined and concluded that the proceedings for such incorporation were legal and valid, and that the court had jurisdiction to make the order for such incorporation, and that an order should be made declaring such territory so described to be an incorporated village by the name of the village of Unity if the electors therein should assent thereto in the manner provided in said order and as required by law, and therefore the court thereby directed such order to be made. Thereupon and on May 20, 1905, the circuit court for Marathon county, upon proceedings in the matter and due notice, ordered that the territory therein described be and the same was thereby incorporated as a village to be known as the village of Unity, if the electors therein assented thereto; that the lands therein constituted 640 acres and not less than one square mile in area; and that *L. H. Cook, J. A. Pettet,* and *J. H. Clark,* three residents and electors within said territory (and defendants herein), should perform the duties of inspectors of election to determine whether the electors therein assented to such incorporation, and that such inspectors should give notice of the time and place of holding such election.

Immediately after the making and entry of said order in the circuit court for Marathon county the plaintiff herein applied to this court and obtained a writ of *certiorari.* Upon the return to said writ and after hearing arguments of counsel this court on April 17, 1906, held that: "An order incorporating a village under secs. 854–866, Stats. (1898), is a final order made in a special proceeding, and hence appealable. An appeal from an order incorporating a village under" said sections "is an adequate remedy, and hence *certiorari* will not lie to review such an order." *In re Salter,* 127 Wis. 677, 106 N. W. 684.

On May 25, 1906, the plaintiff commenced this action in the circuit court for Clark county against the said *L. H. Cook, J. A. Pettet, J. H. Clark,* and others to have the order of the circuit court for Marathon county dated May 20, 1905, and

all subsequent proceedings thereunder declared utterly void and of no binding effect, and to perpetually enjoin the defendants from proceeding thereunder or attempting to hold such election which was noticed to be held May 26, 1906, and for a temporary injunction and costs. To the complaint alleging such facts the defendants demurred on several grounds; among others that it appeared on the face of the complaint that the circuit court for Clark county had no jurisdiction of the subject matter of the action, that another action was pending between the same parties for the same cause, and that the complaint did not state facts sufficient to constitute a cause of action. From an order overruling such demurrer the defendants appeal.

The cause was submitted for the appellants on the brief of *Brown, Pradt & Genrich,* attorneys, and *Kreutzer, Bird & Rosenberry,* of counsel, and for the respondent on that of *R. J. MacBride* and *Geo. L. Jacques.*

CASSODAY, C. J. Since the territory proposed to be incorporated into the village of Unity was partly in the county of Marathon and partly in the county of Clark, the statute authorized the circuit court of either of those counties to take jurisdiction and, upon proper proceedings, to order such incorporation. Sec. 857, Stats. (1898). As indicated in the foregoing statement, such proceedings were instituted in the circuit court for Marathon county and continued in that court until after the appointment of inspectors of election May 20, 1905, and until after the decision of this court quashing the writ of *certiorari,* April 17, 1906. *In re Salter,* 127 Wis. 677, 106 N. W. 684.

The first question here presented is whether it was competent thereafter for the circuit court for Clark county, in a separate action commenced May 25, 1906, to declare the order of the circuit court for Marathon county so made May 20, 1905, and all subsequent proceedings thereunder, utterly void

and of no binding effect, and to perpetually enjoin the defendants from proceeding thereunder or attempting to hold such election. By a long line of decisions, commencing in 15th Wisconsin and ending only a few weeks ago, it has been repeatedly held, in effect, that a judgment or order of one circuit court will not be set aside nor restrained by another circuit court of co-ordinate jurisdiction upon a suit subsequently commenced therein. *Parish v. Marvin,* 15 Wis. 247; *Platto v. Deuster,* 22 Wis. 482; *Orient Ins. Co. v. Sloan,* 70 Wis. 611, 36 N. W. 388; *Coon v. Seymour,* 71 Wis. 340, 37 N. W. 243; *Cardinal v. Eau Claire L. Co.* 75 Wis. 404, 44 N. W. 761; *Stein v. Benedict,* 83 Wis. 603, 53 N. W. 891; *Jackson M. Co. v. Scott,* 130 Wis. 267, 110 N. W. 184, 186; *Pleshek v. McDonell,* 130 Wis. 445, 110 N. W. 269. The remedy, if any, is to be sought in the original action. In the case of proceedings for the incorporation of villages the statute expressly provides that "any question of the validity of such incorporation and proceedings therefor may be tested by *certiorari* or by any other proper action or proceedings brought directly for the purpose of vacating or setting aside the same" within the time prescribed. Ch. 39, Laws of 1901. Of course, such remedy is to be sought in the court where the proceedings were instituted or upon appeal. It is unnecessary to consider any other question in the case.

By the Court.—The order of the circuit court is reversed, and the cause is remanded with direction to dismiss the complaint.

DOOLITTLE, Respondent, vs. J. L. GATES LAND COMPANY, Appellant.

February 2—February 19, 1907.

Tax titles: Form of tax deed: Substantial compliance with statute: Priorities: Later deed based on earlier sale: Ejectment: Condition of recovery as against defective tax title.

1. A tax deed reciting that "W., assignee of the several tax certificates, as stated below, has deposited sixteen certificates," etc.; containing a partial transcript of the certificates, giving descriptions of the lands, amount of the tax on each tract, and after each description the name of a person under the heading "Buyer of certificate at tax sale;" and further reciting that said tracts were separately sold for the nonpayment of taxes "to the said several purchasers," is *held* to be in substantial compliance with sec. 1178, Stats. (1898), and to show sufficiently that W. was the assignee of the original purchasers or intermediate owners of the certificates, and also who were the purchasers of the lands at the tax sales.
2. Title under a tax deed is not cut off by a later tax deed based on a tax sale prior to that on which the earlier deed was based.
3. Where plaintiff in ejectment is entitled to recover by force of a paramount title founded on a tax sale later than the tax sale on which defendant's claim is based, or because the land had been redeemed from a tax sale before the tax deed thereon was issued to defendant, he is not entitled to recover "by reason of a defect or insufficiency of any tax deed under which the defendant claims title," and should therefore not be required, under sec. 3087, Stats. (1898), to pay to defendant the taxes paid by the latter.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Action in ejectment.

Plaintiff's title is derived from Jennie A. White, who May 4, 1900, received and recorded a tax deed from Eau Claire county based on the tax certificate dated May 19, 1896, for

the taxes of 1895. Jennie A. White is described in the tax deed from the county as "assignee of the several tax certificates, as stated below," and below the two parcels of land making up the lands in suit are described as follows:

Description.	Amt.	Buyer of cert. at tax sale.
[First fourteen descriptions omitted.]		
NW. ¼ SE. ¼ sec. 18, T. 27, R. 7.	$7.05	M. B. Hubbard.
SW. ¼ SE. ¼ sec. 18, T. 27, R. 7.	$7.25	F. C. Allen.

Defendant claims title founded on the following deeds: Tax deed issued November 26, 1897, on the tax-sale certificate of May 15, 1894, for the taxes of 1893; tax deed issued September 26, 1900, on the tax-sale certificate of May 21, 1895, for the taxes of 1894; tax deed issued September 26, 1900, on the tax-sale certificate of May 18, 1897, for the taxes of 1896. It appears that on May 29, 1900, the taxes were paid by plaintiff's grantee and the lands redeemed from the sale of May 18, 1897, for the taxes of 1896, on which the last above described deed issued. The evidence showed that the taxes for the years subsequent to the year for which they were redeemed by plaintiff were paid without becoming delinquent. The court refused to order payment to defendant of the taxes assessed on the lands and paid by defendant after it had received a tax deed on a certificate which had been redeemed by plaintiff. This is an appeal from the judgment in favor of plaintiff.

For the appellant the cause was submitted on the brief of *L. M. Sturdevant,* and for the respondent on that of *L. A. Doolittle.*

SIEBECKER, J. The court held that plaintiff had established title to the premises. This holding is attacked on the ground that the tax deed to Jennie A. White is void on its face in failing to state that she is the assignee of the original purchaser of the tax-sale certificates on which the deed issued and because the names of such purchasers are not given in the deed. In the recent case of *Washburn L. Co. v. C., St. P., M.*

& O. R. Co. 124 Wis. 305, 102 N. W. 546, upon review of preceding decisions on this subject, it was stated:

"While the statute prescribes the form to be used in making a tax deed, and adherence thereto with considerable strictness has been uniformly held to be necessary, neither by its terms nor as construed by the decisions does the statute call for strict compliance. Substantial compliance is all that is required. Sec. 1178, Stats. (1898)."

It is urged that nothing appears to show that the grantee in this deed was the assignee of the certificates on which the deed issued. The recital in the deed, "Whereas, Jennie A. White, assignee of the several tax certificates, as stated below," clearly indicates that she is the assignee and holder of the designated certificates, and, in the absence of any showing to the contrary, it must be presumed that the certificates were in fact assigned to her and that the original purchasers parted with them in a lawful manner. This makes her the assignee of such purchasers or of some intermediate owner. The statement in the deed that she had deposited the certificates as assignee is sufficient to meet the calls of the statute, in view of the fact that the recital of the deed specifically refers to the purchaser described in the body of the deed.

It is claimed, however, that the purchasers are not so named in the deed. The deed contains a partial transcript of the certificates, giving descriptions of the lands, amount of tax, and after each description the name of a person as the "Buyer of certificate at tax sale." It is obvious that the person so named as "buyer" refers to the purchaser of the lands at the tax sale. We see no force in the argument that such designation may refer to a person other than the purchaser at the sale of the lands. The language in the deed, "buyer of certificate at tax sale," manifestly refers to the purchasers of the land at such sale and must be so regarded. This interpretation also makes plain the subsequent words inserted in the prescribed form of deed in place of the purchaser, namely, "to the said

several purchasers." These words are descriptive of the persons purchasing at the tax sale, and refer to the persons named under the designation "Buyer of certificate at tax sale." These descriptions of the purchasers of the lands are sufficiently definite under sec. 1178, Stats. (1898), show with sufficient definiteness that there was a sale of the lands for delinquent taxes to the persons named, and furnish the means from which it can be ascertained who the vendees were and whether they were competent to buy.

Plaintiff's title rests on a tax deed of May 4, 1900, recorded the same day and issued on the certificate of May 19, 1896, for the taxes of 1895. Defendant asserts a subsequently acquired title under a tax deed of September 26, 1900, issued on the tax certificate of May 21, 1895, for the taxes of 1894. It is asserted that since defendant's deed is of a later date than plaintiff's deed, based on a tax sale antedating the tax sale on which plaintiff's tax deed issued, it vests defendant with a paramount title. Upon what principle plaintiff's title can be cut off by a deed on a prior tax-sale certificate is not apparent. The controlling principle as to tax titles is that, whenever any claim based on a tax sale ripens into a title under a tax deed issued thereon, it cuts off all prior claims, liens, and interests in the land, and persons claiming under them are barred and retain no rights or interest in the lands as against such subsequent tax title. See *Cole v. Van Ostrand, post*, p. 454, 110 N. W. 884.

Defendant contends that it was error, under the provisions of sec. 3087, Stats. (1898), not to direct as a condition of recovery that plaintiff pay defendant all taxes paid by defendant, with interest and charges, whether levied prior or subsequent to the taxes on which plaintiff's tax title rests. It will be observed that this section grants such relief only "when the plaintiff is entitled to recover by reason of a defect or insufficiency of any tax deed under which the defendant claims title or in the proceedings prior to the sale upon which such tax

deed was issued." Defendant, under his tax deeds, fails, by force of plaintiff's paramount title, to establish any claim under the statutes through deeds based on tax sales prior to the sale on which plaintiff's title is founded, as above stated, and as to its last deed it failed because the tax on which its deed issued had been theretofore paid and the land thereby redeemed from such charge and lien. Neither infirmity in defendant's claim of title comes within the specifications of this section rendering plaintiff liable to pay defendant the amount of delinquent taxes on the land together with accrued interest and charges, and therefore no grounds are shown for a recovery of them in this action. The court properly awarded judgment.

By the Court.—Judgment affirmed.

BEREITER, Respondent, vs. VILLAGE OF ABBOTSFORD, Appellant.

February 2—February 19, 1907.

Villages: Injury from defective sidewalk: Notice of defect: Special verdict: Reading statute to jury: Immaterial error.

1. In an action against a village for injuries from a broken plank in a sidewalk, it being found in a special verdict that the street commissioner had actual notice of the defect long enough to have enabled the defendant, in the exercise of ordinary care, to repair it before the accident, and there being no dispute that the commissioner had such notice at least five days prior to the accident, it was not error to refuse to submit a question in the special verdict as to when the plank which caused the injury was broken.
2. The reading to the jury in such case, by plaintiff's counsel in the course of his argument, of sec. 909, Stats. (1898), relating to the duty of street commissioner, is *held* not a prejudicial error.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

The defendant appeals from a judgment of the circuit court for Clark county rendered against it in an action for damages alleged to have been sustained by the plaintiff resulting from a defective sidewalk. Error is assigned in refusing a nonsuit and in refusing to direct a verdict for defendant, in refusing to submit a question in the special verdict calling for the time when the plank which caused the injury was broken, and in the instructions to the jury, in refusing to amend the special verdict, and in refusing a new trial, all based on the proposition that the evidence showed that the defect which caused the injury existed only in fact a short time before the incident in question, and that the defendant could not be charged with negligence either in permitting it to exist or in not discovering it and repairing it before the accident. In addition to this, it is assigned as error that the plaintiff's counsel was permitted to read to the jury during the course of the argument sec. 909, Stats. (1898).

S. M. Marsh, for the appellant.

For the respondent there was a brief by *R. J. MacBride* and *E. W. Crosby,* and oral argument by *Mr. MacBride.*

TIMLIN, J. From the testimony of the witness Choate, village marshal and street commissioner of the defendant, the sidewalk in question had on June 9th, 10th, and 11th two or more broken planks therein at the point where the plaintiff sustained her injury at 2 o'clock p. m. on June 14, 1904. This is not a case of charging the defendant with constructive notice and with negligence on account of the length of time the sidewalk had been allowed to remain in a defective and dangerous condition. It is a case of actual notice to the street commissioner, Choate, and through him to the village president. The witness Tenore definitely states that there was at least one broken plank on June 13th. Two other witnesses

testify to a state of facts from which the jury could have inferred that the sidewalk was in a defective and dangerous condition continually from June 9th until the time of the injury to the plaintiff. The defense details the breaking of a plank on June 14, 1904, by a wagon heavily laden with lumber passing over the sidewalk. But there was sufficient evidence from which the jury could have inferred that this broken plank was not the broken plank or defect which caused the injury to the plaintiff, and that the broken plank or defect which caused the injury to the plaintiff had existed an unreasonable length of time after the defendant had actual notice of the defect. We cannot undertake to restate all the evidence which leads us to this conclusion. There was therefore no error in refusing the nonsuit, or in refusing to direct a verdict for the defendant, or in refusing to amend the special verdict, or in refusing a new trial.

The special verdict found that the street commissioner had actual notice of the defective condition of the sidewalk long enough to enable the defendant, by the exercise of ordinary care, to have remedied it before the accident. *Cantwell v. Appleton,* 71 Wis. 463, 37 N. W. 813. There was no conflict in the evidence as to when the street commissioner had such notice. This was on or prior to June 9, 1904. It was therefore not only unnecessary but improper to submit any question in a special verdict calling for this detail of evidence. *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644.

With reference to the alleged error which consisted of reading to the jury during the course of the argument sec. 909, Stats. (1898), relative to the duty of a street commissioner in a village, we are not convinced that such reading had any effect on the verdict prejudicial to the appellant.

By the Court.—The judgment of the circuit court is affirmed.

BRUNKOW, Respondent, vs. WATERS, Appellant.

February 2—February 19, 1907.

Appeal: Findings of fact: Trial on justice's return: Animals: Runaway horses causing injury: Negligence of owner: Presumption: Evidence.

1. **Where, on appeal from a justice, a case is determined in circuit court upon the return without a new trial, the conclusions of fact of the circuit court will not be disturbed unless they are contrary to the clear preponderance of the evidence.**
2. **The fact that a horse is running unattended upon the public street raises an inference or presumption of negligence on the part of the custodian, which requires explanation.**
3. **[Whether in such case there is a presumption that the owner or his servant was in charge of the horse when it was negligently allowed to escape, not determined.]**
4. **Testimony that, immediately after a team of horses running unattended on a street had run into another team and caused injury to a person, the owner of the runaway team was on the spot, assisted in separating the horses, took charge of his team, and promised to make it all right with the injured person, was sufficient, in the absence of evidence to the contrary, to justify the conclusion that such owner or his servant was in charge of the horses when they escaped.**

APPEAL from a judgment of the circuit court for Clark county: E. W. HELMS, Judge. *Affirmed.*

This action was commenced in justice's court to recover for personal injuries. Upon the trial in justice's court it appeared without dispute that on the 18th of April, 1904, the plaintiff, an old lady, was sitting on the seat of a lumber wagon standing in a business street in the city of Neillsville, with a two-horse team attached; that the wagon and team belonged to one Schale, who had gone into an adjoining store for a moment, leaving the plaintiff in the wagon holding the lines; that while she was so sitting another team of horses attached to a wagon came running along the street unattended and ran into Schale's horses, jarring the wagon in which the plaintiff

was sitting so that she fell out and was injured; that the two teams became mixed together and were separated by the bystanders; that the defendant *Waters* appeared on the scene directly after the accident and admitted that the horses were his, expressed his sorrow for the occurrence, and said that plaintiff should be taken care of and he would make it right; that plaintiff was taken care of at an adjoining hotel for two weeks and spent $85 for physician's services, medicines, and care; that she suffered considerably and was not entirely recovered at the time of the trial. In addition to these undisputed facts there was evidence tending to show that the team came from a saloon yard near by, where there were stalls for hitching farmers' teams, and that in one of these stalls a two-by-four scantling to which horses were usually tied was broken or pulled out, but there was no proof showing that the defendant's horses actually came from this stall, nor was there any evidence tending to show who was in charge of the horses before they ran nor who put them in the saloon yard.

Upon these facts the justice nonsuited the plaintiff. An appeal was taken from the judgment, but no affidavit for a new trial was filed, and the case was tried in the circuit court upon the testimony returned by the justice, and the judgment of the justice was reversed and judgment entered for the plaintiff for $200 and costs. From this judgment the defendant appeals.

S. M. Marsh, for the appellant.

Geo. L. Jacques, for the respondent.

WINSLOW, J. Notwithstanding there was no new trial of the case in the circuit court it was the duty of the court to give judgment according to the weight of the evidence and the justice of the case without regard to the finding of the justice of the peace. Sec. 3769, Stats. (1898); *Silvernail v. Rust,* 88 Wis. 458, 60 N. W. 787. This court will not reverse the conclusions of fact of the circuit court in such a case unless

they are contrary to the clear preponderance of the evidence. *Donner v. Genz,* 129 Wis. 245, 107 N. W. 1039, 109 N. W. 71.

The circuit judge concluded that the undisputed fact that the horses were running loose and unattended on the street raised an inference or presumption of negligence on the part of the owner, and that, in the absence of testimony to meet or overcome this presumption, it entitles the plaintiff to recover.

There is considerable authority to support the proposition that the fact that a horse is running unattended upon the public street raises an inference or *prima facie* case of negligence on the part of the custodian which requires explanation. *Thane v. Douglass,* 102 Tenn. 307, 52 S. W. 155; 1 Thompson, Com. on Neg. § 1297, and cases cited. While this proposition is not universally held, it seems entirely reasonable in view of the fact that facts showing that the horse did not escape by reason of negligence, but by reason of some occurrence consistent with the exercise of reasonable care, must ordinarily be within the knowledge of the custodian of the horse and rarely within the knowledge of the person injured.

The question whether this inference goes so far as to charge the *owner* with responsibility for such negligence, or, in other words, to raise a presumption that the owner or his servant was in charge of the animal when it was negligently allowed to escape, is not so clear, although supported by authority; the ground being that ownership implies possession, and that in the absence of proof possession is presumed to be in the person entitled thereto. *Norris v. Kohler,* 41 N. Y. 42; *Thane v. Douglass, supra.*

In the present case, however, we are not required to adopt this latter proposition. There was evidence here showing that the owner was on the ground immediately after the occurrence, thus showing his close proximity to the team when it escaped, that he assisted in separating the horses and took charge of them at once, and that he promised to make it all

right with the plaintiff. In the absence of evidence to the contrary, we think this evidence justifies the conclusion that the owner or his servant was in charge of the horses when they escaped.

By the Court.—Judgment affirmed.

ANDERSON, Respondent, vs. ARPIN HARDWOOD LUMBER COMPANY, Appellant.

February 2—February 19, 1907.

(1-3) *Change of venue: Demand: Requisites: Action triable in several counties.* (4-13) *Contracts: Evidence: Competency: Refreshing memory: Undisputed facts: Reasonable value as evidence of contract price: Court and jury: Instructions.* (14, 15) *New trial: Newly-discovered evidence: Cumulative evidence.*

1. A motion for a change of the place of trial, under sec. 2621, Stats. (1898), must be based upon a proper demand therefor.
2. The demand for a change of the place of trial under sec. 2621, Stats. (1898), should be, in form, that the trial be had within "the proper county," naming it and stating why that is the only proper county or, where there is more than one such county, naming them and stating the reasons why the action is properly triable therein.
3. A demand for a change of the place of trial to the county in which the defendant corporation was situated and had its principal office and place of business, not stating that that was "the proper county" or that the cause of action wholly arose therein, was insufficient because, under sec. 2619, Stats. (1898), if the cause of action or some part thereof arose in another county, the action was also properly triable in such latter county.
4. In an action to recover for services in piling lumber under a contract, defendant's bookkeeper having testified without objection that he had paid plaintiff's employees as requested by him and had charged the amounts accordingly, it was competent for him to testify to the aggregate of such payments, refreshing his memory from the books.

5. When evidence is introduced by one party tending to raise an unfavorable inference as to the claim of the adverse party, evidence of an explanatory character reasonably tending to rebut such unfavorable inference may be allowed which might in the absence of the adverse evidence be clearly inadmissible.
6. The exclusion of evidence offered to prove undisputed facts is not a prejudicial error.
7. In case of a dispute as to the contract price for work, in order to render evidence of the reasonable value thereof admissible there must be a direct conflict as to the contract price, and the difference between the claims of the parties must be so great that the reasonable value may discredit the evidence on one side and corroborate that on the other, affording some reasonable ground for believing that the contract was at the price most in harmony with such evidence.
8. Such evidence must be directed to the reasonable value of the work from the standpoint of the parties when the contract was made.
9. The question of the relevancy or competency of such evidence must be decided in each case according to the particular circumstances, and the ruling of the trial court, unless clearly wrong and prejudicial, should not be disturbed on appeal.
10. In an action to recover for work done in piling lumber, where plaintiff claimed that the agreed price was seventy cents per thousand feet and defendant claimed that it was sixty-five cents, the difference is *held* not so great as to render erroneous the exclusion of evidence as to the reasonable value of the work.
11. In an action to recover for work in piling lumber, alleged to have been done at a stipulated price, the evidence is *held* to warrant a finding by the jury that there was an agreed price for the work.
12. Refusal to instruct the jury that evidence of what defendant's bookkeeper said as to defendant being paid at the end of the season at the rate claimed by him was not evidentiary of a contract to pay for the work at that rate, was not error in view of instructions given, to the effect that the right to recover at that rate depended upon the bargain made with defendant's manager, that there was no evidence of any contract made at a later date with any other officer of defendant at that rate, and that the bookkeeper was not shown to have had any authority to make a contract for the piling, and in view, also, of a ruling by the court that, in the argument to the jury, plaintiff's counsel should not mention, as evidence to be considered, such statement by the bookkeeper.

13. The jury having been instructed, among other things, that the burden was upon plaintiff to prove that there was a contract and that it was as claimed by him, and that unless they found from the preponderance of the evidence that the minds of the parties met as to making a contract and all the terms thereof they should find for defendant in that regard, it is *held* that the case was not submitted to the jury on the theory that a contract for a stipulated rate was made and that it was for them to determine merely what that rate was.
14. Newly-discovered evidence upon a particular point is not cumulative to the evidence upon that point introduced at the trial, if it is of a different kind.
15. A new trial should not be granted because of newly-discovered evidence unless there is substantial ground for believing that such evidence may probably change the result.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

The action is on contract and was commenced in Eau Claire county. This in short was the plaintiff's claim: Between November 20, 1902, and October 29, 1903, plaintiff piled 19,087,033 feet of lumber for the defendant at the agreed price of seventy cents per thousand feet, and during the same time performed other work for the latter in and about its sawmill, for which it agreed to pay $417.25, and between the 23d day of February, 1903, and the 13th day of April, 1903, expended money for it at its request to the amount of $6.14, payment of all of which was duly demanded and payment thereof refused. Judgment therefor with interest thereon from the 29th day of October, 1903, with costs and disbursements of the action, was demanded.

The defendant answered admitting that the plaintiff during the period mentioned in the complaint performed work in piling lumber for it, alleging full payment therefor, putting in issue the other allegations of the complaint, counterclaiming to the effect that during such period plaintiff performed work, labor, and services for it in piling 19,123,607 feet of lumber at sixty-five cents per thousand feet, which was the reasonable

value of such services and the agreed price therefor, and alleging payment to plaintiff and on his account of $13,194.95, whereas the whole amount payable to him and on his account was $12,429.69 for piling the lumber and $51.25 for other labor, the aggregate being less than the amount paid to the extent of $714.01. Judgment for said sum with interest was demanded. The allegations of the counterclaim were duly put in issue by a reply.

Within the time for making a demand for a change of venue the defendant appeared in the action by attorneys, who served on the plaintiff's attorneys a demand in these words:

"Please take notice that we are retained by and appear for the defendant in the above-entitled action, and that defendant demands that the trial of this action be had within the county of Wood, state of Wisconsin, for the reason that the said defendant, at the time of the commencement of this action, resided, and still resides, in the city of Grand Rapids, in said county of Wood, state of Wisconsin. That the defendant is a corporation of the state of Wisconsin, situated and having its principal office and place of business at Grand Rapids, in said Wood county."

The plaintiff's attorneys having failed within five days after service of such demand upon them to serve on defendant's attorneys a written consent that the place of trial be changed, the defendant by its attorneys within twenty days after service of the demand moved the court to change the place of trial, pursuant to sec. 2621, Stats. (1898). The motion was supported by affidavits to the effect that plaintiff's work was done at Atlanta, Gates county (now Rusk county), Wisconsin; that he lived there during the progress of the work; that all money earned was paid at that place; that when he was through with his work he there demanded his pay at the rate of seventy cents per thousand feet for the lumber piled, which was refused, and that defendant's principal office and place of business has always been at Grand Rapids, Wood county, Wisconsin. In opposition there was an affidavit by plaintiff

to this effect: Plaintiff's home for many years prior to the commencement of this action was at Eau Claire, Eau Claire county, Wisconsin. He was only temporarily absent therefrom while serving the defendant. He performed other work for defendant than piling lumber, for the recovery of which the action was brought. The balance due had not been ascertained till after he returned from Atlanta to his home in Eau Claire. He did not make any demand for payment of the balance due him at Atlanta, but after he returned to Eau Claire and ascertained the whole amount due his attorney made a demand in writing for payment thereof. The $6.14 alleged in the complaint to have been expended for the defendant was paid out for certain specified articles in the city of Eau Claire, Wisconsin, a statement being sent by mail to the defendant at Atlanta, Wisconsin, and demand made for payment by including the same in the total claim for which payment was demanded as before stated, at which time he resided in the city of Eau Claire, Wisconsin.

The motion to change the venue was denied.

The court held that the claim for $6.14 was not established by the evidence so as to carry the same to the jury. On the other branches of the case the jury rendered a verdict in plaintiff's favor on his claim for $729.67, and a verdict wholly disallowing the counterclaim. Judgment was rendered accordingly.

For the appellant there was a brief by *Bundy & Wilcox*, and oral argument by *R. P. Wilcox*.

For the respondent there was a brief by *Wickham & Farr*, and oral argument by *James Wickham*.

MARSHALL, J. The ruling against appellant's motion for a change of the place of trial from Eau Claire county to Wood county involves an important practice question, which must be solved by the statutes governing the matter without much aid from judicial authorities. Such statutes provide

that the proper place for the trial of a civil action against a corporation of the sort to which appellant belongs is in "the county in which it is situated or has its principal office or place of business, or in which the cause of action or some part thereof arose"—sec. 2619, Stats. (1898); and that "when the county designated in the summons or complaint in any action is not the proper place of trial thereof the defendant may, within twenty days after the service of the complaint, serve upon the attorney for the plaintiff a demand in writing that the trial be had within the proper county, specifying it, unless there be more than one such county, and the reason therefor;" that "within five days after service of such demand the plaintiff's attorney may serve a written consent that the place of trial be changed, and specify to what county, having the option to name one of two or more in which it may be properly triable, and such consent shall change the place of trial accordingly;" and that "if the plaintiff's consent be not so served the defendant may, within twenty days after the service of his demand, move to change the place of trial, and shall have costs if his motion be granted." Sec. 2621, Stats. (1898).

Thus it will be seen that the prime essential to a compulsory change of the place of trial of this action was a statutory demand. That contemplates opportunity on the part of the plaintiff to make the change by merely serving a written consent in general terms when there is but one "proper county," and by such a consent coupled with a choice where there is more than one such county. A motion and order is only contingently necessary. The demand and the consent, as it has been said, work a change *ipso facto*. *Woodward v. Hanchett*, 52 Wis. 482, 9 N. W. 468. A motion is only necessary in case consent is not given in the manner the statute provides, and is only proper when the statutory basis therefor has been laid by service of a proper demand.

It will readily be seen, and is freely conceded, that the proper place for the trial of such an action as this is not con-

fined to the county where the corporation is situated or has its principal office or place of business, but it extends to the county, or counties, where the cause of action or any part thereof arose. So a demand for a change of the place of trial to the home of the corporation was not obligatory unless the cause of action wholly arose there, which we may well say in passing is not claimed. It also seems quite plain that the statute contemplates the making of a demand sufficiently broad to show that the county where the action was brought is not the nor a proper county and containing such statements as to enable plaintiff to phrase his consent to a change with reference to the or any proper county.

The words "the proper county" are material and should be embodied in the demand. They, by themselves, suggest that the county where the action was brought is not the county in which the corporation is situated or it has its principal office or place of business, or in which the cause of action or some part thereof arose. The words "the reason therefor" relate directly to the words "the proper county." They, therefore, call for a statement in the demand not only showing why the county where the action was brought was not the proper place for the trial, but considered with reference to what follows, as to consent and choice, for a statement of why the particular county to which the change is demanded is the proper place for the trial, or, in case of there being more than one county, for a statement of the reasons and disclosing the names of such counties.

It is considered that any other construction of the statute than the one suggested would not enable both parties to an action to obtain the full benefit of the plan for changing the place of trial thereof without judicial interference. The words "specifying it, unless there be more than one such county" do not signify, it is thought, that the proper place for the trial is not required to be disclosed in the demand, except in case of there being but one such place, but suggest that where there is but one proper county the demand should be

for a change thereto. The scheme taken as a whole, as indicated, contemplates a disclosure by the defendant of every fact required to be placed before the plaintiff's attorney in order for him to respond to the demand within the full scope of his privilege. So the form of the demand should be that the trial be had within the proper county, to wit: the county of ——, followed by a statement of why that is the only proper county, or, where there is more than one such county, followed by a statement in accordance with what we have said. The significance of the words "the proper county" does not seem to have been recognized by Mr. Bryant in his work on Code Practice, as indicated at page 83, which seems to have been followed. Other standard works on practice under statutes similar to ours phrase the demand as we have indicated. 1 Estee, Pleadings (4th ed.) § 59; Winslow, Forms, § 1802.

Applying the foregoing here the demand was insufficient. It required the trial to be had in Wood county because the corporation and its principal office and place of business were situated therein. The omission of the words "the proper county" suggested that Wood county was not the sole proper place for trial. The demand at best only disclosed that such county was a proper place for the trial. It did not in any way suggest that there were not other such counties, including Eau Claire county. It might well be that the corporation was situated and had its principal office and place of business in Wood county and that the cause of action or some part thereof arose in Eau Claire or some other county. The demand not being an efficient compliance with the statute, the service thereof did not require plaintiff's attorneys to respond thereto, nor did such service create a legitimate basis for the motion which was denied. That is supported by decisions elsewhere under statutes similar to ours. *Vt. Cent. R. Co. v. Northern R. Co.* 6 How. Pr. 106; *Van Dyck v. McQuade,* 18 Hun, 376; *Estrada v. Orena,* 54 Cal. 407; *Byrne v. Byrne,* 57 Cal. 348; *Warner v. Warner,* 100 Cal. 11, 17, 34 Pac. 523.

Appellant's bookkeeper, Mr. Whitney, having testified to

the total payment to respondent, as to which according to such testimony there was no controversy, was called as a witness for the latter and under objection was allowed to testify to the amount thereof represented by the wages of respondent's employees, notwithstanding the witness stated he had no knowledge of the subject except what he gathered from the books and from a statement prepared by him therefrom. No suggestion is made by the learned counsel for appellant that such evidence was prejudicial, and we are unable to discover that it was. Moreover, the record shows the witness had testified, without objection, that he paid the men as requested by respondent and charged the amounts accordingly. Such being the case it was competent for him to testify to the aggregate of the payments, refreshing his memory from his books, which it seems is what occurred. In such cases it is not necessary to put the memoranda in evidence.

The dominant controversy was whether the contract price for handling and piling the lumber was sixty-five or seventy cents per thousand feet. Respondent having testified the first information he received that appellant only intended to allow him sixty-five was when the bookkeeper gave him a statement of his account in August, 1903, and that he then complained of the statement being wrong, in that the correct rate was seventy cents per thousand feet, but went on with his work without seeing appellant's managing officer in respect to the matter,—for the purpose of showing, by way of inference, that the contract price was sixty-five cents and giving significance to the circumstance of respondent proceeding with his work, as he did, after receiving the statement, Whitney was called to show what occurred between him and respondent in respect to the statement and why it was made at the sixty-five cent rate. He testified, in effect, that prior to the making of the statement he did not receive any information inconsistent with the way he credited respondent for his work, and that he told respondent, upon his complaining, that he did not know

of any other than a sixty-five cent rate, and if respondent was to get more he would have to see Mr. Arpin, and though respondent said he would do so he did not. On cross-examination he testified that he did not say to respondent at the time the complaint was made that the work would be paid for at a seventy-cent rate at the end of the season and figure up and state the amount then coming to him at such rate. To contradict that and to explain why respondent proceeded with his work, as he did, after receiving the statement, respondent testified on rebuttal, substantially, that Whitney, when the complaint was made, did not suggest seeing Arpin about the matter, and did not say that he did not know anything about any but a sixty-five cent rate for the work, and testified, under objection, that Whitney said when the work was done it would be figured up at a seventy-cent rate and at such rate respondent would be in credit at the time of the conversation to the amount of $23.84, and so said without going to the books, as if he had it in mind.

It seems, under the circumstances, the evidence was proper. The position of appellant, in presenting the evidence of Whitney, was that if the latter knew of no other rate for crediting up respondent's work than the one he was guided by, and respondent, though so informed and directed to see the managing officer of the company in respect to the matter, proceeded with his work without doing so or making further complaint, such circumstances were evidentiary in appellant's favor as to the controversy to be solved. To meet that phase of the case it was material to contradict Whitney's evidence and by showing the whole conversation which took place between him and respondent explain the latter's subsequent conduct. The evidence complained of was offered and received wholly for that purpose and not as original evidence to establish the contract price. It was made relevant by the evidence presented by appellant casting discredit on respondent's evidence previously given.

One of the cardinal principles often required to be observed in testing a ruling on evidence is that the method adopted by the adverse party to establish the case in his behalf should be taken into consideration. Testimony which would be clearly irrelevant or incompetent if offered by one party in the first instance may become very pertinent in rebuttal or explanation of evidence offered by the adversary. 1 Jones, Ev. § 168. Many illustrations of that might be given. One is the situation we have here. The rule applicable to the particular situation may be stated thus: When evidence is introduced by one party tending to raise an unfavorable inference as to the claim of the adverse party, evidence of an explanatory character reasonably tending to rebut such unfavorable inference may be allowed which might in the absence of the adverse evidence be clearly inadmissible. *Gage v. Chesebro,* 49 Wis. 486, 5 N. W. 881; *Smith v. State,* 51 Wis. 615, 8 N. W. 410; *Richmond & D. R. Co. v. Garner,* 91 Ga. 27, 16 S. E. 110, are fair illustrations of this.

Complaint is made because the court refused to allow a statement drawn from appellant's books by the bookkeeper to be received as part of his evidence. We are unable to see how that was prejudicial, since there was no controversy except as regards the contract rate for the work and it was undisputed that the work was credited up at a sixty-five cent rate and respondent was informed thereof, as heretofore seen.

For the purpose of showing that respondent had notice as early as August, 1903, of appellant's understanding that the work was to be paid for at a sixty-five cent rate, defendant offered in evidence the statement furnished respondent, heretofore referred to, and the offer was rejected. It seems to be a conclusive answer to the assignment of error on this point that it was undisputed that respondent received notice of appellant's attitude in all respects as it was desired to show by introducing the statement.

The defendant was not permitted to make proof as to the reasonable value per thousand feet for doing the work per-

formed by respondent, nor the reasonable cost thereof. It is claimed that such evidence was competent as bearing on the probability of the contract having been made as respondent claimed.

It is not in every case of a dispute as to the contract price for work or material that evidence of the reasonable value is permissible. That seems to be fairly settled by the authorities, as counsel for respondent claim.

The first case here on the subject is *Kvammen v. Meridean M. Co.* 58 Wis. 399, 17 N. W. 22. The controversy was whether the contract price for operating a portion of a sawmill devoted to the manufacture of lath and shingles was forty cents or twenty-five cents per thousand of the product. It will be noted that the difference between the two contentions was very much larger than in this case, yet the court without definitely deciding the matter inclined to the view that the evidence was properly rejected. Reference was made to *Johnson v. Harder,* 45 Iowa, 677, where somewhat similar evidence was held proper under peculiar circumstances. The difference between the two contentions was very large and the evidence on each side very strong. The court said such evidence "should be admitted with great caution, and limited to its strictly legitimate province." This court held that the controversy in hand did not satisfy the rule stated as well as the one in *Campau v. Moran,* 31 Mich. 280. Some indorsement was given to the doctrine of that case in these words:

"It may be, as intimated by Mr. Justice COOLEY in *Campau v. Moran, supra,* that where the evidence adduced upon both sides is in direct conflict and pretty evenly balanced, as to the contract price, evidence that the cost of performance was greatly in excess of or greatly below such price might afford some reasonable ground for believing that the contract was for the price nearest the cost."

The doctrine thus suggested by Judge COOLEY was subsequently quite consistently applied in several cases by the Michigan court.

The subject seems next to have been presented here in *Valley L. Co. v. Smith,* 71 Wis. 304, 37 N. W. 412. The plaintiff claimed that the contract was to the effect that defendant should pay it $200 for the use of certain logging camps, and the adverse claim was that plaintiff should have $200 for a good title to the forty-acre tract of land upon which the logging camps were situated. It will be seen that the difference was very great. The court held that evidence of the logging camps, of themselves, being useless to the plaintiff and of no value, was improperly rejected. It will be observed by an examination of the opinion that the great disparity between the contentions was the ground of the decision. That will be more clearly seen by examining the decisions cited for support. The rule in *Campau v. Moran, supra,* and some Michigan decisions following it were referred to. *Swain v. Cheney,* 41 N. H. 232, was cited, where the difference between the parties amounted to fifty per cent. *Kidder v. Smith,* 34 Vt. 294, was cited, the difference between the adverse contentions being about seventy-five per cent. In deciding the case the court said:

"Where the disparity between the value of property, and what is claimed to have been the contract price, is small, and within the fair range of what different persons might esteem to be a fair value, such evidence would be very slight, perhaps too slight to be admissible, but when the difference is very great, and beyond the range of fair difference in judgment, it might be entitled to much weight."

Allison v. Horning, 22 Ohio St. 138, was also referred to. There the difference between the parties was about ten per cent. The court, apparently with some hesitation, held that it was sufficient to render evidence of the reasonable value admissible. Along the same lines and explanatory of the Michigan authorities is *Short v. Cure,* 100 Mich. 418, 420, 59 N. W. 173, where it was said that such testimony is admissible only in cases where the difference in value is so great as to be

beyond the range of a fair difference in judgment. The matter there in controversy was not precisely like the one in hand, but the rule invoked was the one declared in *Campau v. Moran,* 31 Mich. 280, and subsequently repeatedly applied.

The next instance where the subject was presented here is in *Bell v. Radford,* 72 Wis. 402, 39 N. W. 482. The difference between the parties was thirty-three and one-third per cent. The next instance was in *Mygatt v. Tarbell,* 85 Wis. 457, 467, 55 N. W. 1031. There the difference was very much larger than in the case before us. The court said with reference to the agreement testified to, "this was a surprisingly low price, and under the rule laid down in *Valley L. Co. v. Smith,* 71 Wis. 304, 37 N. W. 412, and *Bell v. Radford,* 72 Wis. 402, 39 N. W. 482, evidence showing the value . . . was admissible." Thus it will be seen that the admission of the evidence was approved because of the "surprisingly low price" testified to on the one side as that agreed upon.

If we were to attempt to review the authorities elsewhere, in general, on the question under discussion this opinion would be extended to a great length without in the end arriving at a more definite conclusion than can well be reached by relying on the decisions heretofore made here with the additional helps to which we have already referred, and the rule to be observed as regards the decision of such a question by the trial court. It seems that the limitations suggested in *Kvammen v. Meridean M. Co.* 58 Wis. 399, 17 N. W. 22, have been adopted as a rule. Such rule leaves the trial court considerable latitude for the exercise of judgment as to when the facts are such as to render the evidence admissible as matter of right. The court must necessarily decide the question of relevancy or competency according to the particular circumstances of each case and, as in all such situations, the ruling, unless clearly wrong and unless prejudicial to the adverse party, should not be disturbed on appeal. It has often been decided here that the weight indicated should be given to the

decision of a trial court as to the admission of evidence when it is based on the existence or nonexistence of facts required to have been determined as a basis for the ruling, and that principle is elementary. 1 Jones, Ev. § 170.

To render such evidence as that under consideration admissible in a case of this sort there must be a direct conflict as to the contract price of the thing to which it relates. The difference must be so great that the reasonable value thereof *from the standpoint of the parties when the contract was made may reasonably discredit the evidence on the one side and corroborate that on the other, affording some* reasonable ground for believing that the contract was at the *price most in harmony with such evidence.* No guide is at hand in our decisions as to the difference between the adverse claims requisite to satisfy the call for a large difference, but in no case has it been nearly so small as in the instance in hand.

When the trial court was called to make the ruling complained of the evidence was undisputed that at the time of the negotiations leading up to the making of the contract, if one were made, appellant offered respondent sixty-five cents per thousand feet for such work and respondent demanded, or said he ought to have, seventy cents, claiming that during the previous season he lost money doing similar work for appellant at the rate offered. The difference between the parties was about eight per cent. and that was asked in view of the experience of the season before. True, such difference when applied to nearly a year's work and the handling of over 19,000,000 feet of lumber made a considerable sum, but since, as appears, some twelve fourteenths of the asked compensation was required to pay the expenses, and appellant must have had in contemplation all the interferences liable to arise during the progress of the work, it is difficult to conclude the trial court was clearly wrong in holding that the difference was not very great, within the meaning of the rule. We come to this conclusion viewing the situation as it was when the parties

conducted their negotiations, not as one might view the work after its completion, in determining its reasonable cost.

It is of considerable and perhaps controlling importance that the direct question as to cost and reasonable value did not go to the value of the work, as the parties must have contemplated it at the time of their negotiations, but to the reasonable value, with all uncertainties which existed at the time of the negotiations eliminated. In *Bell v. Radford,* 72 Wis. 402, 39 N. W. 482, the evidence went to the reasonable value of the subject of the transaction at the time the trade was made, and the same is true as we understand it, in *Mygatt v. Tarbell,* 85 Wis. 457, 55 N. W. 1031, and *Valley L. Co. v. Smith,* 71 Wis. 304, 37 N. W. 412, which seems to be the logical basis for allowing such evidence. This was the main question ruled on: What was the reasonable value of sorting, piling, and doing the work specified, which *Mr. Anderson* did during the season of 1902 and 1903, per thousand, or what was its reasonable value during the sawing season of 1903? In *Shakespeare v. Baughman,* 113 Mich. 551, 71 N. W. 874, evidence of the reasonable value of work actually done in performance of a contract, to discredit the testimony of a party as to the price agreed upon before performance commenced, was held improper and the judgment was reversed because of its admission, the court saying:

"Evidence of the value of the services contemplated, taking consideration of the contingencies, rather than those actually found necessary, would bear upon the question, the latter being likely to throw very little, if any, light upon it."

In that case the limitations upon the admissibility of such evidence, which we have suggested, were fully recognized.

Complaint is made because the court refused to permit appellant to introduce in evidence respondent's statement of his extra work differing from one previously made. That seems sufficiently answered by the circumstance that the offer was made only to explain why the proper credit had not been

given, and by appellant's request for instructions it is seen that the amount was not in controversy at the close of the trial.

There was a motion for a nonsuit and a motion in appellant's favor for a verdict. Both were grounded on the theory that the evidence did not warrant a finding that there was an agreed price for the work. It is considered that the motions were properly denied because the answer admitted that there was such a price, but alleged it was sixty-five cents per thousand feet. Moreover, we cannot agree that there was no evidence worthy of belief, showing that the work was done for a stipulated price. Respondent testified that at the time of the negotiations in respect to the work he said to McMillan, the person representing the company, that if he handled the lumber by the thousand he wanted a seventy-cent rate, and did not want to do the work at all by the thousand if a certain person mentioned was to be the scaler. Whereupon he was directed to write for a scaler, hire his crew and do the work, and that without further negotiations he did so. The evidence in that regard was contradicted and there were circumstances corroborating and discrediting it, but, on the whole, it was fairly within the province of a jury to believe it. It is not contended, as we understand it, but what, if the circumstances were as respondent claimed, a contract was made at a seventy-cent rate. The fact that the work was done from first to last as it would necessarily have been in case of there being a contract price, respondent being credited with his work and charged with all the expenses, accordingly, as he rendered accounts and requested payment, no question being raised as to whether they were proper or not, was a most persuasive circumstance in favor of the contract theory. There was some explanation of that, it is true, but none of controlling significance, especially in view of the admission in the answer that the work was done at a contract price.

The court refused to instruct the jury, as requested, that the evidence of what Whitney said as to respondent being

paid at a seventy-cent rate at the end of the season, if true, was not evidentiary of a contract to pay for the work at that rate, but did say to the jury, "You will remember that the right to recover at the rate of seventy cents must depend upon the bargain made with McMillan. There is no evidence of any contract made at a later date with any other officer of the defendant company at that rate. As stated by counsel, the bookkeeper is not shown to have had any authority to make a contract for the piling;" and during the argument to the jury the court said, in ruling on an objection by counsel for appellant to the argument of counsel for respondent, that the former should omit mentioning, as evidence to be considered, that of respondent as to Whitney's telling him how his account would stand if his work was credited at a seventy-cent rate, and doing so as if he had theretofore figured the matter up. On the whole, it seems that the jury were instructed sufficiently favorably to the appellant on the subject covered by the request refused. Whitney's evidence that he credited up the work at a sixty-five cent rate and did not know of any other was introduced by appellant to establish an evidentiary circumstance tending to prove that such was the contract rate. That rendered the statement complained of, if he made such, an evidentiary circumstance of the same character. Though Whitney had no right to make a contract in respect to the matter, as the jury were expressly instructed by request, his situation was such that there was a strong probability of his having knowledge of the contract rate. That was necessary to the performance of his duties. Therefore, upon appellant's presenting his evidence as circumstantially establishing its claim, it was proper to meet it as was done, and to let the whole matter go to the jury with the admonition the court gave and the instruction that whether a contract was made and its character depended wholly on what occurred between respondent and McMillan.

It is claimed that the court submitted the case to the jury

upon the theory that a contract to do the work at a stipulated rate per thousand feet was made and that it was for them to determine from the evidence what that rate was. We are inclined to think the case might well have been submitted in that way, since it would have been in harmony with the pleadings and there was evidence on both sides in like harmony, but as we understand the instructions the case was not so submitted. The jury were told that unless they came to the conclusion to a reasonable certainty from the preponderance of the evidence that the minds of the parties met as to making a contract, and all the terms thereof, they should find for the defendant as to plaintiff's claim in that regard, and that the burden of proof in respect to whether there was a contract and whether it was as claimed by plaintiff was on the latter. That together with other instructions left it to the jury to say not only whether there was a contract to pile the lumber at a stipulated price per thousand feet, but, if so, whether it was as claimed by respondent, and correctly placed the burden of proof.

It is suggested the court should have directed the jury that if they believed respondent's version of what occurred in the negotiations with McMillan was true the finding should be in his favor, and if they believed from the evidence the version contended for on the other side was true the finding should be for appellant. It may be that such a submission, coupled with proper instructions as to the burden of proof in respect to the matter, would have been permissible, but as we understand the charge the court adopted a course less favorable to respondent. We may well say in passing that the argument at this point seems to concede that the only controversy was one as to the contract price. Certainly if there was one as to whether a contract was made or not, the court could not well have submitted the case as suggested.

It does not seem that the court left it to the jury, as claimed, to construe the contract, but left it to them, as indicated, to

determine from what they found from the evidence to have occurred, whether a contract was in fact made and the terms of it. The situation was such, that whether the minds of the parties really met in the contractual sense, and, if so, the precise points of meeting, were matters of fact to be determined not only from what was said but from the conduct of the parties at the time of the negotiations and subsequently thereto.

Lastly, complaint is made because the court refused to set aside the verdict and grant a new trial upon the ground, among others, of newly-discovered evidence. Such evidence was that of one person to the effect that respondent admitted to him no contract was made before the work of piling the lumber was commenced, and that some time thereafter it was agreed that he should do the work on a guaranteed wage basis of $2.50 per day, and as much more as he could make at a sixty-five cent rate. That was contradictory of the claim in the answer and corroborative of evidence on the part of appellant. It was not, strictly speaking, cumulative, as claimed by respondent's counsel. Additional evidence on the same point is not cumulative if it is of a different kind. To illustrate, evidence of admissions by a party as to the nature of a transaction between him and another is not cumulative as to evidence of such party in respect to such transaction. It is a mistake to characterize evidence on a particular point as cumulative merely because evidence has been introduced bearing on the same point. When there is a dissimilarity in the kind of evidence the last is not cumulative to the first. Sometimes it is said generally that additional evidence tending to prove the facts in relation to which evidence has been adduced is cumulative, but that is not necessarily so. *Andersen v. State,* 43 Conn. 514, 519; *Hines v. Driver,* 100 Ind. 315, 327; *Winfield Bldg. & L. Asso. v. McMullen,* 59 Kan. 493, 53 Pac. 481; *Grogan v. C. & O. R. Co.* 39 W. Va. 415, 421, 19 S. E. 563; *Marshall v. Mathers,* 103 Ind. 458, 3 N. E. 120.

However, since the new evidence was met by the positive

denial of respondent and was of a character not ordinarily entitled to much weight, being what is called the weakest kind of testimony (*Dreher v. Fitchburg*, 22 Wis. 675), we cannot well say that the motion for a new trial was improperly denied, if grounded, alone, upon the theory that had the testimony of the witness been produced upon the trial the result would probably have been the same. The trial court in passing on such a matter has broad discretion, and only for abuse of it can the result reached be disturbed on appeal. Such discretion should not be exercised in favor of a retrial without some pretty substantial ground for believing that with the aid of the new discovery the scales of justice may probably incline the other way. *Goldsworthy v. Linden,* 75 Wis. 24, 43 N. W. 656; *Kennedy v. Plank,* 120 Wis. 197, 97 N. W. 895.

There are a few questions discussed in the briefs of counsel which we have not referred to, but they are of such a minor character that they may well be passed without special notice.

By the Court.—The judgment is affirmed.

TIMLIN, J., took no part.

FOSTER, Respondent, vs. LOWE, Appellant.

February 2—February 19, 1907.

Vendor and purchaser of land: Contract presumed to be complete: Default in payment: Option to declare contract void: Notice of election: Action for price: Tender of conveyance, when not necessary: Disability to convey: Assignment of contract.

1. A bilateral land contract purporting on its face to set out the mutual undertakings of the parties is presumed to be a complete expression of their final contract, and this presumption can be overcome, if at all, only by the clearest proof.
2. A land contract providing that if the purchaser shall fail to make any of the payments as stipulated the agreement "shall be thenceforth utterly void" and all payments thereon for-

feited, "subject to be revived and renewed in writing at the option of" the vendor, gives to the vendor, after such failure, the right to declare the contract at an end or to sue for the unpaid purchase price or for specific performance.

3. Commencement of an action for the purchase price and filing of the complaint is a sufficient declaration in writing of the vendor's election that the contract shall continue in force.

4. Where by the terms of a land contract the purchaser agrees to pay the whole price absolutely and the vendor promises that after such payment and upon demand a conveyance shall be made, the liability of the purchaser is absolute and no tender of conveyance or showing of ability to convey need either precede or accompany the recovery of the purchase price.

[5. Whether in such a case there might be an equitable defense or counterclaim where it was shown that the vendor had disabled himself to convey and was insolvent, not determined.]

6. The vendor in a land contract who assigns the contract or the right to the payments thereunder holds the legal title to the land in trust for the parties to the contract or, upon completion of the payments, for the purchaser alone, and such trust follows the legal title wherever it may go, except into the hands of a *bona fide* holder for value.

7. Where the vendor in a land contract, having the option to declare the contract at an end because of default in payments, assigns the contract, such assignment carries with it the right to exercise said option, and the vendor cannot thereafter exercise it.

APPEAL from a judgment of the circuit court for Clark county: E. W. HELMS, Judge. *Affirmed.*

Action at law upon two ordinary land contracts, dated August 18, 1898, in each of which the defendant promised to pay to one Conrad Krumrey the sum of $125, at specified dates, up to June 1, 1899, and of which he had paid on each contract the sum of $37.50. Krumrey agreed in the same instruments that, after said sum of $125 on each contract should be fully paid, he would, on demand, thereafter cause to be executed and delivered a warranty deed of the premises described, except for the taxes, which were agreed to be paid by the defendant. The contracts further provided:

"If the second party [defendant] shall fail to make any of the payments above specified, at the time and in the manner

above specified, . . . this agreement shall be thenceforth utterly void and all payments thereon forfeited to the first party, subject to be revived and renewed in writing at the option of the first party."

The contracts were under seal and acknowledged. These contracts were both assigned to the plaintiff by writing indorsed thereon on August 25, 1898, for a valuable consideration. The defendant wholly failed to pay any further sums as promised in said contracts, and no written notice had ever been given him of the exercise of election by either Krumrey or plaintiff that the contract should be revived or renewed. Defendant failed to pay the taxes for 1899 and all subsequent years, and, the property being sold for taxes in May, 1900, a tax deed had been issued to one Schuster in May, 1903, the regularity of which was assailed but not decided. In October, 1903, Krumrey made a quitclaim deed of the contracted premises to said Schuster.

The principal defense alleged was that the land contracts did not contain the whole contract between the parties; that a scheme had been entered into in June, 1898, to induce a certain manufacturing partnership, Kerr Bros. & Co., then located in Ohio, to come to Neillsville and establish a business in a then vacant factory, and that they had entered into contract with certain citizens of Neillsville, who were a self-constituted committee, whereby Kerr Bros. & Co. stipulated that, in consideration of certain aid from the citizens of Neillsville, they would establish a business, employing generally at least twenty-five men, would equip the factory with machinery, and would persist in said business for five years, with some other agreements. Defendant was solicited to purchase these lots, which were of actual sale value of only about $10 apiece, as a method of contributing to the aid or bonus which was to be given to Kerr Bros. & Co., such solicitation being by citizens of Neillsville, who were desirous, for the public welfare, of securing this industry. Krumrey held title to the

lots merely as trustee for Kerr Bros. & Co. The claim was that the written contract made by Kerr Bros. & Co. with the citizens' committee entered into and formed a part of the contract for the purchase of these lots, and, they having breached this contract, defendant claimed to have been discharged.

The court found that the two land contracts sued upon were not shown to have been connected with or dependent upon the contracts made by Kerr Bros. & Co.; indeed, that defendant did not know either the existence or the contents of said Kerr Bros. & Co. contracts; that he was induced to make the land contracts by representations of fellow-citizens as to the advantages that would accrue to him and to the city of Neillsville from the location of the new industry there, and that Kerr Bros. & Co. had made some kind of a contract with somebody that they would there establish and maintain the business. Accordingly, the court held that the written land contracts must be deemed to embody the whole contract between Krumrey and the defendant, and that plaintiff was entitled to recover the amounts remaining due thereon, and rendered judgment in plaintiff's favor therefor, from which the defendant appeals.

For the appellant there was a brief by *Grow & Campman* and *J. R. & C. R. Sturdevant,* and oral argument by *Charles F. Grow.*

For the respondent there was a brief by *Marsh & Schoengarth,* and oral argument by *S. M. Marsh.*

Dodge, J. The land contracts involved are bilateral and, upon their face, purport to set out the mutual undertakings of the two parties. There is, therefore, a presumption that they do so, and that if the minds of the parties had in fact met upon any other elements, conditions, or propositions, all such had been abandoned, except as to those things which were expressly defined in the writing which, by their signatures, they had declared to be a correct and complete expression of

their final contract. *Conant v. Estate of Kimball,* 95 Wis. 550, 70 N. W. 74; *John O'Brien L. Co. v. Wilkinson,* 117 Wis. 468, 94 N. W. 337; *Jost v. Wolf,* 130 Wis. 37, 110 N. W. 232. Only by the very clearest proof, if at all, can this presumption be overcome. *Kercheval v. Doty,* 31 Wis. 476, 491. We are unable to say that the court's finding that it has not been so overcome is antagonized by any clear preponderance of the evidence, and must, therefore, proceed to the consideration of the rights of the parties upon the basis of the land contracts as written.

It is contended that, by the defendant's breach of the contracts in failing to pay the several instalments thereon as they became due, these contracts have become terminated, and, according to their very terms, are null and void. This subject was quite fully considered in *Shenners v. Pritchard,* 104 Wis. 287, 80 N. W. 458, where was pointed out the absurdity of a construction which would enable the wrongdoer to gain an advantage over and against the will of the other party by his own default, and the conclusion was reached that no such construction as here contended for was permissible, especially where, as is the case here, the contract expressly declared an option in the creditor to revive and continue the contract in force after such defaults. The conclusion reached was that "this clause in the contract leaves it for the vendor to say whether he will declare the contract void or not, and that he may elect to sue for the unpaid purchase money or for a specific performance of the contract, or to declare the contract at an end." We see no occasion again to review the authorities or reasons then fully considered, nor to depart from the rule of law established by that case.

Further, it is contended that notice of the exercise of the creditor's election to continue the contract in force is an essential prerequisite to commencing suit. That contention was also considered and negatived in the *Shenners Case,* and it was held that, so far at least as the demand for payment of

the money promised by the contract was concerned, the commencement of the suit was an all-sufficient declaration and notice of that election. The only distinction on this subject between the *Shenners Case* and this is that the creditor's option here is to be exercised in writing, which was not required in the former case. If the commencement of suit and filing of complaint is a sufficient declaration of the exercise of the election, as ruled in that case, it certainly satisfies the requirement of a writing, for it is in writing, and most unambiguously declares the choice of the plaintiff that the contract shall be in force and the money shall be paid. As said in the *Shenners Case,* no time is fixed for the exercise of this election, and a contrary ruling would result merely in a dismissal of this action until the notice had been given, when it might immediately be recommenced. This would be mere empty formality in a case where the defendant's position is not that of having been deterred from paying because of the supposed annulment of the contract, but of resistance to any liability upon it, however urgent the choice of the creditor that it should be in force.

Another contention pressed is that it is shown that the plaintiff has not the title to the land, and is not in a position to make conveyance thereof upon payment. It has been uniformly ruled in this state that a contract of this sort, wherein the purchaser agrees to pay the whole purchase price absolutely in consideration of merely a promise by the grantor that after such completed payment and upon demand a conveyance of the land shall be made, the former's liability is absolute at law, and that no tender of conveyance, nor showing of ability to convey, need either precede or accompany the recovery of the purchase price. *Gale v. Best,* 20 Wis. 44; *Shenners v. Pritchard,* 104 Wis. 287, 80 N. W. 458; *Collins v. Schmidt,* 126 Wis. 227, 105 N. W. 671. In the last of those cases the plaintiff was a mere assignee of one instalment of the purchase price and did not hold any title to the real es-

tate, and made no offer of conveyance or showing of any ability to procure conveyance. The result of such holding is that when the purchaser shall have paid in accordance with the land contract, and not until then, he acquires a binding obligation on the part of the vendor to convey the land to him, and has a right of action to enforce that obligation either by suit for specific performance or action for damages resulting from breach thereof. Whether there might be an equitable defense or counterclaim where it was shown that the vendor had so disabled himself and was so insolvent that neither of these remedies could be available is a question which may be reserved until it arises. There is no showing in this case that Krumrey is otherwise than entirely responsible, nor that the land is not in reach of a suit and decree for specific performance, although it is shown that it has been conveyed by quitclaim to another person, who, however, is not proven to be a *bona fide* purchaser. The vendor in a land contract who assigns that contract or the right to the payments thereunder to another holds the legal title to the land in trust for the two parties under that contract, and such trust persists and accompanies the legal title wherever it may go, unless, indeed, into the hands of a *bona fide* holder for value. Of course, when payment is completed that trust is solely and exclusively for the purchaser, who thereby gains the complete equitable title to the land. *Church v. Smith,* 39 Wis. 492; *Bartz v. Paff,* 95 Wis. 95, 69 N. W. 297.

The suggestion that because Krumrey, some time after having assigned the land contracts, made a quitclaim of the land to a third person, he had exercised the option to declare the contract void so that the contrary election to now declare it valid and binding cannot be exercised, we do not deem of force. Under our present legal policy of easy and complete assignment of rights of action, at least those on contract, the assignment of the debt itself necessarily carries with it all securities and all rights of the first owner serving to make it val-

uable, and the assignment of the debts in this instance transferred to the assignee the right to exercise the option conferred by the contract upon the vendor, and denuded the latter of any right or power to so exercise it as to interfere with his assignee's protections for the debt. It would be obviously unreasonable to hold that Krumrey might, for a valuable consideration, assign this debt to the plaintiff and still have the right to declare that the contract between him and the defendant should be void and no debt exist.

We discover no error in the judgment of the trial court.

By the Court.—Judgment affirmed.

KIRKLAND, Plaintiff in error, vs. THE STATE, Defendant in error.

February 2—February 19, 1907.

Appeal and error: Review: Denial of new trial.

The decision of the trial court denying a new trial will not be disturbed on appeal unless it clearly appears that the verdict is not supported by the evidence.

ERROR to review a judgment of the circuit court for Dunn county: E. W. HELMS, Circuit Judge. *Affirmed.*

This is a proceeding against the plaintiff in error upon the complaint of Olga Lien, charging that plaintiff in error is the father of her bastard child, born April 12, 1902. Plaintiff in error pleaded not guilty. The case was twice tried before a jury in circuit court for Dunn county. The court set aside the verdict of the jury at the first trial, which found that plaintiff in error was the father of the child as charged by the prosecutrix. At the March, 1906, term of the court the case was again tried, and the jury found the plaintiff in error to

be the father of the child. A motion for a new trial was denied and judgment was rendered adjudging plaintiff in error to be the father of the child, charging him with its maintenance and support, and awarding prosecutrix the sum of $250. He was also charged with the costs of the proceeding, and, in default of compliance with the judgment, was to be imprisoned until he should be lawfully discharged. Plaintiff in error brings this writ for a review of the proceedings.

For the plaintiff in error there was a brief by *J. R. Mathews* and *Bundy & Varnum,* and oral argument by *R. E. Bundy.*

W. S. Swenson, for the defendant in error.

SIEBECKER, J. Upon the question of the paternity of the child two questions of fact were submitted to the jury for their determination under the evidence in the case, namely: (1) Whether plaintiff in error had sexual intercourse with the prosecutrix as charged; and, (2) if so, whether she had intercourse with another person at about the same time, thereby rendering the fact of the child's paternity so uncertain that the jury could not say that it was established beyond a reasonable doubt. *Baker v. State,* 47 Wis. 111, 2 N. W. 110. As to the first issue, it is not seriously contended but that, under the conflicting evidence, it was properly submitted for determination to the jury. It was declared in *Roberts v. State,* 84 Wis. 361, 54 N. W. 580, respecting this question in a case of this nature:

"Where the two parties testify directly against each other as to a single fact, and there is no corroboration of either one, the jury must weigh the testimony and determine which was entitled to the greater credit."

In this case, however, the testimony of the complaining witness is not without circumstances of corroboration, in that there is evidence of other witnesses showing that the plaintiff in error and the complaining witness were observed together

at times and under circumstances such as she states, and the admissions of the plaintiff in error tend to support her claims in this respect.

The main contention of the plaintiff in error is that the finding of the jury, that the complaining witness did not have intercourse with any other person than plaintiff in error at about the time they found the child was begotten, is not supported by the evidence. It is urged that the evidence of the prosecutrix as to this fact is so overwhelmingly impeached that the court should have directed the jury that this fact was established beyond reasonable controversy. True, her denial of such intercourse with another at about this time is contradicted by the evidence of witnesses who testify positively to an act of intercourse of another person with her at the time specified. Her denial of this fact is, however, corroborated by the evidence of such other person. An examination of the whole evidence, which need not be stated in detail, discloses that she was also corroborated in various respects as to other facts material to this inquiry, wherein plaintiff in error claimed that her evidence was impeached and rendered incredible. We are of the opinion that the court properly submitted these questions to the jury, and that they, as the sole judges of the credibility of these witnesses and the weight of their evidence, were justified in finding the verdict they rendered. The trial court's decision denying a new trial should not be disturbed unless it clearly appears that the verdict was not supported by the evidence in the case. We find no ground for disturbing the judgment of the circuit court.

By the Court.—Judgment affirmed.

AUKLAND, Appellant, vs. ARNOLD and others, Respondents.

January 31—March 19, 1907.

Bills and notes: Signature procured by fraud.

Under sec. 1676—25 of the Negotiable Instrument Law (ch. 356, Laws of 1899) the title of a person who negotiates an instrument is absolutely void as to all the signers when the instrument *or any signature thereto* has been procured by fraudulently representing its character, if the person so deceived could not have obtained knowledge of its character by the use of ordinary care.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

An action on a joint and several promissory note for $933.34, dated April 14, 1903, payable two years after date to the order of W. S. Gilmore & Co., signed by all of the defendants. Before the maturity of the note it was negotiated for value by W. S. Gilmore & Co. to the plaintiff.

All the defendants except two appeared and answered. They allege that their signatures were obtained by fraudulent representations of Gilmore & Co.'s agent as to the nature of the papers signed, alleging that they were deceived and fraudulently led to believe that they were signing a paper stated to be a guaranty instead of a note, as now claimed and asserted by plaintiff. The defendants allege that they had agreed with Gilmore & Co. to purchase from them a stallion at the agreed price of $2,800, to be paid for upon the terms and in the manner following: The horse was to be kept by Gilmore & Co. in the immediate vicinity and put into the field for service in the community, and the money collected for the services of the horse was to be applied each year in payment of the purchase price up to an amount not exceeding one third of the purchase price. In case the amounts collected for the services of the horse in any one year did not equal the one-third part of the purchase price, such unpaid portion was to be paid out

of the money received for such services thereafter. In case the sum realized during any of the first three years exceeded one third of such purchase price and any unpaid portion due, then defendants were to receive such excess. Defendants further claim that they were to sign an "agreement," called a "guaranty," by which they were to obligate themselves to pay any balance due on the purchase price should the horse die, before full payment of the purchase price, on account of the neglect or fault of the defendants. They further allege that the agents of Gilmore & Co. falsely and fraudulently represented to them that the three papers presented to them for signature were such "guaranty" contracts, whereas in truth and fact, as they now learn, such papers were three promissory notes, on one of which this action is brought, and that they each relied upon the false representations believing them to be true, and for that reason signed the notes without knowing their character and nature and without any want of ordinary care to learn their nature and character.

The case was submitted to a jury and a special verdict was returned to the effect that the plaintiff became the owner of the note sued on for value and in good faith, and that he had no knowledge at the time of purchase of such facts as amounted to bad faith. The jury found specifically that Gilmore & Co., payees in the note, "for the purpose of inducing defendants to sign the same, knowingly, falsely, and fraudulently represented to said defendants that it was a writing different in character and nature from a promissory note," and further found that defendants could not by the use of ordinary care have obtained knowledge of its character and nature. Plaintiff moved for direction of a verdict and that the answer to the question, finding that defendants were not able in the exercise of ordinary care to learn the character and nature of the instruments, be changed from "no" to "yes" as to all of the defendants appearing except the defendant *Charles Zibuski,* as to whom the plaintiff admits the answer to be sup-

ported by the evidence. This motion was denied, and upon the motion of the defendants the court ordered judgment in defendants' favor. This is an appeal from this judgment.

For the appellant there was a brief by *Ben S. Smith,* attorney, and *Richard Sleight,* of counsel, and oral argument by *Mr. Sleight.*

W. S. Smith and *T. M. Holland,* for the respondents.

SIEBECKER, J. The fact stands uncontradicted by the record, as above stated, that one of the signatures to the note sued on was procured under circumstances showing that the person so signing did not know the character and nature of the instrument and could not have obtained such knowledge by the use of ordinary care. Appellant concedes that his title to the note is absolutely void as against the person whose signature was so procured, but insists that this fact in no way affects the validity of the note as against the other persons who signed it, if their signatures were not so procured. Whether this claim can be sustained depends upon the significance of sec. 1676—25, Stats. (Supp. 1906), found in ch. 356, Laws of 1899, known as the Negotiable Instrument Act. This section provides:

"The title of a person who negotiates an instrument is defective within the meaning of this act when he obtains the instrument, or any signature thereto, by fraud, . . . or when he negotiates it . . . under such circumstances as amount to a fraud; and the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care."

The first clause of this section was considered and interpreted in the recent case of *Hodge v. Smith,* 130 Wis. 326, 110 N. W. 192. It was there held that the title of a person who negotiates commercial paper is defective when he has obtained any signature thereto by fraud, and that if the party so defrauded be relieved from liability thereon, then

such fraud makes such paper voidable by all the other persons who signed it, though they did not participate in and were ignorant of such fraudulent conduct at the time they signed it. This conclusion was reached upon the ground that, when several persons assume such an obligation, it is material and important that all who join as makers should share equally in bearing the burden of its payment, and if, through the fraud of the person holding it, such equality of burden is disturbed and the burden increased as to some of the persons signing it, such fraud renders the title defective as to all of the persons who signed it.

This being the ascertained meaning of the first part of the section, we proceed to consider and determine the meaning of the following and concluding clause. In terms it expresses the rule of law recognized in the decisions of this court when it was enacted, which was to the effect that, when a signature to a negotiable instrument is obtained by falsely and fraudulently misrepresenting its character, and the person signing it could not have obtained knowledge of the falsity and fraud by the use of ordinary care, this makes the title to the instrument absolutely void as to such signer. *Butler v. Carns,* 37 Wis. 61; *Walker v. Ebert,* 29 Wis. 194; *Keller v. Ruppold,* 115 Wis. 636, 92 N. W. 364; *Franklin v. Killilea,* 126 Wis. 88, 104 N. W. 993. It is conceded by appellant that the title to a note like the one in question is absolutely void as against any person whose signature thereto was procured by false and fraudulent representations as to its character and under such circumstances that he could not have obtained knowledge of its character by the use of ordinary care; but it is averred that the fact of one signature having been so procured does not invalidate the note as to other signers whose signatures were not so procured. The words of the statute, "the title of such person is absolutely void when such instrument or signature was so procured from a person" through misrepresenting its character and from one who was

not guilty of a want of ordinary care, must be read in connection with the preceding clause, declaring a person's title defective "when he obtains the instrument or any signature thereto" in the prohibited manner. These phrases, in their connection, embody the idea that, if the instrument or any signature is obtained in one of the inhibited ways covered by the first and second clauses, then the title to the instrument is, respectively, defective or absolutely void. This court, in construing this language, has found that, if one of several signatures to a note was procured by fraud, the title of the person negotiating it was thereby rendered defective as to all of the signers. Since all of the signers under such circumstances are relieved from liability upon this principle, the conclusion seems necessarily to follow that the title of a person who negotiates an instrument is absolutely void when the instrument or any signature thereto has been procured by fraudulently misrepresenting its character, if the person so deceived could not have obtained knowledge of its character by the use of ordinary care. The considerations which forced the court, in construing the first part of this section, to hold the title to negotiable instruments defective under such circumstances, apply with equal force to the last part of the section, and make the title to the instrument absolutely void under the conditions therein specified. From this construction of the statute it follows that, if one of the signers of a note is released from liability because the note is absolutely void as to him, then the note is likewise invalid as to all of the other signers.

The fact is established that the signature of *Charles Zibuski* to this note was procured by false and fraudulent representations as to its character, and that he could not have obtained knowledge of its true character by the use of ordinary care. This released him from liability, and made plaintiff's title to the note absolutely void as to all of the defendants. He cannot recover.

By the court.—Judgment affirmed.

PAULUS, Respondent, vs. O'NEILL, Executor, Appellant.

February 2 —March 19, 1907.

Fraud: Recovery of money paid by participant: Court and jury: Waiver of right to have question submitted to jury.

After the death of one P., who was the holder of a note given by B. for $1,000, P.'s widow, having possession of the note and fraudulently intending to appropriate it to her own use, surrendered it to B. in consideration of a new note to her for $900, and B. afterwards paid to her $350 on the new note. Subsequently B.'s liability to the estate of P. on the original note was established, and recovery from the widow of the $350 paid to her was sought by B.'s executor. Upon the evidence (stated in the opinion) it is *held* that the question whether B. was a party to the fraud, so that the amount paid by him could not be recovered, should have been submitted to the jury.

TIMLIN and SIEBECKER, JJ., dissenting, are of the opinion that the right to have said question submitted to the jury was waived by B.'s executor, he having requested a special verdict; having presented the form thereof, not including that question, to the court; having made no objection to the verdict as submitted; having first brought the question to the attention of the court, after the jury were discharged, by a motion for judgment which assumed the right and duty of the court to pass upon the question; and not having moved for a new trial after such motion for judgment was denied.

APPEAL from a judgment of the circuit court for Clark county: E. W. HELMS, Judge. *Reversed.*

John Paulus during his life held a note of $1,000 against Lemont E. Brown. Paulus died December 11, 1902. Shortly after his death his widow, *Ellen Paulus,* had possession of the note, and surrendered it to Brown for a new note of $900 executed by Brown and payable to her. On the 13th day of October, 1903, Brown paid $350 on this $900 note. On November 19, 1903, Brown died. The $1,000 note was filed against Brown's estate by the administrator of the Paulus estate. The executor of Brown's estate, *James O'Neill,*

defendant and appellant here, defended the claim on the $1,000 note. The claim on the $1,000 not was allowed against Brown's estate. The claim for balance due on the $900 note was filed against Brown's estate by *Ellen Paulus,* plaintiff and respondent here, and defended by the executor of Brown's estate, and also a counterclaim set up by him to recover the $350 paid on this $900 note by Brown.

In the county court all of these claims were tried together, and the trial resulted in judgment against Brown's estate allowing the $1,000 claim in favor of the Paulus estate and disallowing the claim of plaintiff, *Ellen Paulus,* for balance due on the $900 note, and allowing the counterclaim for the $350 and interest in favor of the Brown estate and against *Ellen Paulus.* The plaintiff, *Ellen Paulus,* appealed to the circuit court. The case was tried by the court and a jury. The defendant demanded a special verdict, which was submitted. The jury found as follows:

"1. Was John Paulus at the time of his death on December 11, 1902, the owner and in the possession of the $1,000 note executed to him by Brown? *A.* Yes. 2. Was said note ever paid to John Paulus in his lifetime? *A.* No. 3. Did said $1,000 note come to the possession of *Ellen Paulus* after the death of her husband? *A.* Yes. 4. Did *Ellen Paulus* surrender and deliver to Brown said $1,000 note in consideration for the note of $900 signed by Brown payable to *Ellen Paulus* and dated January 14, 1903? *A.* Yes. 5. Was such surrender and delivery by *Ellen Paulus* of said $1,000 note to Brown the sole and only consideration received by Brown for the making of said $900 note? *A.* Yes. 6. Did Lemont E. Brown pay to the plaintiff, *Ellen Paulus,* on October 13, 1903, the sum of $350 on said $900 note which was indorsed thereon? *A.* Yes (by the court)."

The court ordered judgment dismissing the claim of the plaintiff for balance due on the $900 note and dismissed the defendant's counterclaim. The circuit judge rendered a decision in writing, in which he held that the transaction between *Ellen Paulus* and Lemont E. Brown which resulted in

the surrender of the $1,000 note and the execution of the $900 note was fraudulent, and that every inference from the facts proved seemed to point to unlawful motive on the part of both plaintiff and Brown, and that none of the inferences pointed the other way, hence the counterclaim should be dismissed; that in so far as the fraudulent purpose had ripened into action by the payment of the $350 it should not be disturbed. Defendant appealed to this court from so much of the judgment as dismissed the counterclaim.

For the appellant there was a brief by *Grow & Campman,* attorneys, and *J. R. & C. R. Sturdevant,* of counsel, and oral argument by *Charles F. Grow.*

For the respondent the cause was submitted on the brief of *W. F. Bailey.*

KERWIN, J. It is established by the verdict on the trial below that John Paulus was the owner of the $1,000 note at the time of his death, that the same was unpaid, and came into the possession of his widow, *Ellen Paulus,* shortly after his death; that she surrendered it to Brown in consideration of the $900 note payable to her; that such surrender was the only consideration received by Brown for the $900 note; and that on October 13, 1903, Brown paid to *Ellen Paulus* $350 on the $900 note. From the findings of the jury it appears that *Ellen Paulus* intended by the exchange of the $1,000 note for the $900 note to appropriate to her own use the $1,000 note belonging to the Paulus estate. The main question upon this appeal is whether Brown participated in such fraudulent transaction and knew, or ought to have known, that Ellen Paulus was not the owner of the note.

In talking with Mr. Sturdevant in January after the death of John Paulus, Brown exhibited the note and claimed it had for the money he borrowed to put on the mill, and he said it been paid. Mr. Sturdevant asked him if the note was given was, and that the administrator wanted him to pay the $1,000

over again, and said: "If I have my note, doesn't that show I paid it? Ain't I all right if I have my note?" To which Mr. Sturdevant replied: "I don't know as to that. The note is pretty good evidence it is paid, but who did you pay it to?" To which Brown replied: "What difference does that make so long as I have my note?" It also appears from the evidence that Mr. Sturdevant asked him if he paid it to Mr. Paulus, and Brown replied: "If I have my note, ain't that all right?" but did not state to whom he paid it. The testimony also shows that he was given to understand at this time that the amount of the note would have to be paid to the estate, and that he said, in effect, he could pay it again if he had to.

Under this evidence mainly, in connection with the facts established by the verdict, the court below found fraudulent participation on the part of Brown as a matter of law. The appellant insisted that the court erred in indulging in a presumption of fraud, and that if there was any evidence in the case sufficient to raise the question it was a question of fact and should have been submitted to the jury. It is well settled that fraud can be established only by evidence that is clear and satisfactory. *Bowe v. Gage,* 127 Wis. 245, 106 N. W. 1074; *Shaw v. Gilbert,* 111 Wis. 165, 86 N. W. 188; *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 71 N. W. 69. We cannot find that there is such clear and satisfactory evidence as would justify the court below in holding that fraud upon the part of Brown was established as a matter of law and therefore the question should have been submitted to the jury.

By the Court.—That part of the judgment appealed from is reversed, with costs, and the action remanded for a new trial upon the counterclaim.

TIMLIN, J. (*dissenting*). I cannot agree that the judgment of the circuit court should be reversed. The counsel for de-

fendant in the court below requested a special verdict. The special verdict set out in the majority opinion was handed up to the trial court presumably by the party requesting it. There was no suggestion that any other or additional question of fact should be submitted to the jury. There was no objection to the verdict as submitted. After the jury returned the special verdict the defendant's counsel moved the trial court for judgment on said verdict in favor of the defendant and against the plaintiff dismissing the plaintiff's complaint, and also moved for judgment in favor of the defendant and against the plaintiff on the counterclaim pleaded in the answer. The trial court granted the defendant's motion for judgment on the verdict and denied the defendant's motion for judgment on the counterclaim, and upon such ruling ordered judgment entered accordingly, dismissing both the plaintiff's claim and the defendant's counterclaim. The defendant filed exceptions to that part of the order dismissing his counterclaim, and on these exceptions, upon appeal from the judgment, seeks now to reverse that judgment because the special verdict does not cover all the issuable controverted facts. There is nothing in the return to this court to indicate that there was any replication to the defendant's counterclaim. The right to recover on the counterclaim was denied, upon the ground that the evidence established that the defendant's decedent and the plaintiff were engaged in a scheme to defraud the Paulus estate, and that the $350 was paid on the $900 note in part execution of such fraudulent scheme, and therefore could not be recovered back within the rule of *Clarke v. Lincoln L. Co.* 59 Wis. 655, 18 N. W. 492; *Wight v. Rindskopf,* 43 Wis. 344; *Fargo v. Ladd,* 6 Wis. 106. The question of the equal delict of the plaintiff and the defendant's decedent in the matter in question is rightly treated in the majority opinion as a question of fact not covered by the special verdict. It was not included in any pleading in the case, but is of such nature as to make it proper to be raised as a bar

against the defendant's right of recovery on the counterclaim if established by the preponderance of evidence. Can there be any efficient or practical administration of law under a rule which forbids the addition of a general finding to a special verdict and reverses judgments because the special verdict does not cover and pass upon all the controverted issues of fact in the case, where there was no request by either party to submit that fact to the jury, no objection to the special verdict as submitted, where the fact was not pleaded, where the fact in question was brought to the attention of the trial court for the first time after verdict rendered and jury discharged, by motion for judgment which assumed the right and duty of the court to pass upon it, and where there was no request for a new trial? No greater impeachment of the law, no severer reproach on its administration, is conceivable to me than that the rules of its procedure are so established and framed that, contrary to the interest of the public, which requires the termination of legal controversy, and without reference to the merits of the cause or the rights of the parties *inter se*, judgments are reversed and cases ordered for retrial upon technical omissions, against the happening of which ordinary prudence is unavailable and ordinary intelligence insufficient to guard. Add to this that the rule in question permits a party to offer an incomplete special verdict to the court or to stand by in silence while an incomplete special verdict is presented and submitted to the jury without calling the attention of the trial court in any way to its incompleteness, to continue to take part in the trial, and after the verdict is returned, if it be found in the main against him on the merits, to raise the objection that there are some special issues of fact developed by the evidence and not covered by the verdict, and so frustrate the whole object of the trial. It would be pertinent in this connection to ask for what purpose laws are made and courts are instituted? Surely not for the purpose of entangling the parties litigant in difficulties of procedure dealing in

mere dialectics or sitting in judgment for the discussion and determination of impractical and unprofitable sophisms.

No matter how wisely rules of law are framed, little benefit flows therefrom if impracticable and unworkable rules of procedure intervene to prevent their application. To any person of considerable experience in the trial of causes it must be manifest that requiring from a jury a special verdict determining by separate propositions or answers to separate questions the various issues of fact which arise upon the pleadings, or which arise during the trial and might have been pleaded, forbidding any general finding to accompany these special findings, permitting the parties litigant to allow such special verdict to be submitted without objection and without suggestion that other propositions of fact should be embodied therein, and to continue to participate in the trial after such verdict has been proposed, settled, and submitted, and to move for judgment thereon or on the verdict and evidence after such verdict has been returned, and then, after having failed to obtain favorable answers from the jury, to overthrow all the work of the trial on the ground that there are some issuable controverted propositions of fact not covered by forms which have acquired an arbitrary significance and unworkable rule of procedure. All accurate generalizations of issuable relevant facts from a mass of minor facts for the purpose of framing a pleading is done in an office with time and care, not in the hurry of a trial, is aided at common law by forms which have acquired an arbitrary significance and comprehensiveness, and the omissions which often occur after all this are frequently cured by answer, waiver, or the statutes of jeofail. Even in pleadings, which take place before instead of at the end of a trial, and undertake to set forth only one side of the controversy, there were many miscarriages of justice. In Code pleading this process of selection and generalization, the result of study and care, is helped out by presumption and liberal construction, and defects or

omissions are cured by waiver, by failure to object to the reception of evidence, by the freedom of amendment, and to some extent by a sort of arbitrary and comprehensive value given to some forms of expression. The work of drafting a special verdict in a complicated case is much more difficult than the art of pleading, must be done more hastily, has not the above-mentioned adventitious aids, and under this rule of the majority opinion there is nothing can cure a slip or omission therein. It would be no justification of the rule of the majority opinion even if there were in this state half a dozen legal luminaries who could in difficult cases successfully accomplish this feat of properly drafting a special verdict. The laws are, or should be, for all, not alone for the heaven-descended. The laws are, or should be, for complicated conditions of fact as well as for simple conditions. Besides, is it not the experience of the law that, with all the aids and advantages possessed by the pleader, common-law pleading was finally found so inadequate for the purpose of administering justice that it was absolutely discarded in the country of its origin, and exists today nowhere unimproved and unmodified by statute? But an examination of the decisions of this court, as well as an appeal to experience, will go to show the impracticability of the rules of procedure in question.

In *Cullen v. Hanisch,* 114 Wis. 24, 32, 33, 89 N. W. 900, citing and referring to cases running through more than sixty volumes of reports and covering more than twenty-five years in time, the court, in a tone of regret at the miscarriage of justice which does honor to the writer, says that "in some jurisdictions such rule does not seem to be understood." In *Patnode v. Westenhaver,* 114 Wis. 460, 90 N. W. 467, this court said:

"The manner in which a special verdict should be framed has been so often, so recently, and so fully stated *that we cannot reasonably expect, by further discussing the subject, to eradicate the false notions of the statute in respect thereto* evidenced by the verdict in this case."

Shall we then give up in despair? See, also, in the same strain, *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816; but compare the disapproved detail therein with that approved in *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109, 74 N. W. 554. Compare the form of verdict found in *Bigelow v. Danielson,* 102 Wis. 470, 78 N. W. 599, and there held to be insufficient, with the case of *Mauch v. Hartford, supra,* and *Patnode v. Westenhaver, supra;* also compare *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352, 362, 77 N. W. 714. Compare *Andrews v. C., M. & St. P. R. Co.* 96 Wis. 348, 71 N. W. 372, and questions there held necessary to be submitted with the criterion of good pleading. Such examination and comparison, I think, will demonstrate that "in some jurisdictions" the rules of this court relative to what issues of fact should and what should not be submitted to the jury in a special verdict are, after a quarter of a century of precept and practice, much misunderstood. It will be readily conceded that the proper application of these rules is still more difficult than the understanding of the rules. It would, I think, be the part of wisdom to look for the cause of this misunderstanding elsewhere than in the obtuseness or perverseness of "some jurisdictions." To me it seems that if we retain the special verdict in our practice, and I think it should be retained, we must treat it as the wisdom of the law has treated every other step in practice. That is to say, that all controverted questions of fact necessary to uphold the judgment of the court below and not covered by the special verdict must be held to have been decided by the court by its judgment, and that the party who fails to object to the special verdict on this ground and fails to request the insertion therein of the omitted items of fact has thereby waived his right to a jury trial *pro tanto.* Waiver is one of the necessary and fundamental doctrines of the common law. Littleton says, "It is the passing by of a thing." The ancient books on practice abound with examples of waiver. The recognition of this common-law doctrine is

widespread. 28 Am. & Eng. Ency. of Law (1st ed.) 587–591, and cases.

Two divergent lines of decisions in this court may be here referred to, namely: *Sherman v. Menominee River L. Co.* 77 Wis. 14, 45 N. W. 1079; *Jenewein v. Irving,* 122 Wis. 228, 99 N. W. 346, 903; *Hildman v. Phillips,* 106 Wis. 611, 82 N. W. 566, which hold that such defect in a special verdict is not waived by a failure to object to the questions submitted or to request the submission of other questions. It is noticeable that this rule is based on *Sherman v. Menominee River L. Co.* 77 Wis. 14, 45 N. W. 1079, decided at a time when it was not unusual in this state to take a general finding in addition to the special verdict. The court said:

"It is claimed that the counsel for the defendant made no objections to the questions submitted, and made no request to submit such questions of negligence, and therefore waived the same. This would undoubtedly be so where such special verdict is accompanied by a general verdict. *Kelley v. C., M. & St. P. R. Co.* 53 Wis. 74, 9 N. W. 816. But where a judgment is based upon a special verdict alone, which fails to determine all the material and controverted facts in issue, there can be no such waiver."

After criticising the practice of submitting a general finding with a special verdict, this court finally, in *Wills v. Ashland L., P. & St. R. Co.* 108 Wis. 225, 84 N. W. 998, called attention to such criticism and condemned the practice. None of these cases, however, covers the instant case, because there was here not only the absence of objection to the special verdict and the failure to request additional findings, but also the action of appellant's counsel in requesting the special verdict and presumably handing it up to the court in its present form. There was also in the instant case the act of defendant's counsel supplementing the above and confirming his attitude upon the question, which consisted in waiting until after the jury was discharged and then moving for judgment on his counterclaim, not basing such motion on the verdict, hence necessarily

on the evidence not covered by such verdict. The law in this state, however, seems to be that if one without calling or requesting a jury go to trial on the whole case before the court he will be held to have waived his right to a jury trial, but if after a jury is called and has passed upon all the issues submitted or requested to be submitted to them, and are discharged, a party submits all the remaining questions to the court by request that the court adjudge in his favor thereon, he will be held not to have waived a jury trial as to such facts omitted from the verdict.

There is a line of decisions in this court commencing with *Leonard v. Rogan,* 20 Wis. 540, where it was held that a party to a civil action who goes to trial before the judge alone without objection waives his right to have a jury pass upon any of the issues of fact. *Hrouska v. Janke,* 66 Wis. 252, 28 N. W. 166, where it was held that, notwithstanding the statute required that a verdict in ejectment should state the particular estate recovered (sec. 3084, R. S. 1878), the parties litigant waived this requirement where they failed to object to the verdict as submitted. *Bullen v. Milwaukee T. Co.* 109 Wis. 41, 85 N. W. 115, where the court said:

"There is a further conclusive answer to the complaint that the court failed to submit the question of the authority of the officers of the corporation to make the note. The request made to the court to submit the single issue as regards whether the corporation received consideration for the note waived the submission of any other question of fact."

Schultz v. C., M. & St. P. R. Co. 48 Wis. 375, 4 N. W. 399, where the court said:

"Regularly, it thereupon became the duty of the court to submit to the jury questions of fact in writing, covering all of the material issues in the case upon which there was any conflict of evidence. R. S. 1878, sec. 2858; *Hutchinson v. C. & N. W. R. Co.* 41 Wis. 541. The court thus submitted a single question, to wit, whether the plaintiff, when injured, was in the service of defendant, and failed to submit specially

other material controverted questions of fact in issue in the case. Counsel for defendant objected generally to the question submitted, and to a portion of the charge of the court. But no specific objection was made or exception taken to the failure of the court to submit questions covering all of the issues. The court attempted to comply with the statute. The objection only informed the court that counsel thought the question submitted an improper one. No suggestion was made that counsel thought or desired that other questions should be submitted. All other issues were in fact submitted to the jury in the general charge, and we are unable to discover any erroneous statement of the law therein. It seems to us that under such circumstances it was the duty of counsel then and there to make the specific objection that the question submitted was not the only one in issue, and that they desired a special submission of other issues. Failing to do so, but standing by during the whole proceeding without objection or exception reaching to the irregularity, we think, and so hold, that they waived the irregularity, and cannot afterwards be heard to complain of it. *Any other rule would or might render the statute giving the right to a special verdict an instrument of wrong and injustice.*"

Since this opinion was written the "other rule" has to a certain extent been established with the effect of rendering the statute giving the right to a special verdict "an instrument of wrong and injustice." What matters it that there was also a general verdict in the case last referred to? Does that give the silence and tacit acquiescence of the party who fails to fect from a moral or legal standpoint? If a party can so bring the omission to the notice of the court any different ef- waive his right to have the finding of a jury upon the whole case and so permit the court to find, and if he can so waive his right to have the finding of the jury on a specific issue of fact in a case where the special verdict is supplemented by a general finding, why do not the same acts constitute a waiver of the right to have the jury pass on the question, and a consequent authority to the court to pass upon the question, in cases where the special findings of the jury are accompanied by no

general verdict? In *Geisinger v. Beyl,* 80 Wis. 443, 50 N. W. 501, it was alleged as error that the verdict of the jury did not cover the issue of occupancy or possession of the land in controversy. The court said:

"The special verdict contains no finding to that effect. Hence, unless such nonoccupancy is proved by the uncontroverted evidence, the judgment cannot be upheld. Such is the rule of *Hutchinson v. C. & N. W. R. Co.* 41 Wis. 541, and many other cases decided by this court. It is claimed on behalf of defendant that there is no testimony on the subject. Were such the fact, we would be called upon to determine whether there is any legal presumption of occupancy or nonoccupancy—a question suggested, but not determined, in *Pier v. Fond du Lac,* 38 Wis. 470. But, for reasons that will now be stated, we think the fact is otherwise. . . . But there is another fact in the case which is fatal to the objection under consideration. The court said to the jury that 'the questions which the court directs you to answer involve all the controverted facts of the case upon which plaintiff founds his claim.' No exception was taken to this language. If the defendant thought that the nonoccupancy of the land was a controverted fact in the case, or was entirely unproved, then was the time for him to speak. But he failed to do so. His silence is equivalent to an admission that the nonoccupancy was proved. A suggestion on the trial that the plaintiff's proofs were defective in this particular would no doubt have called out further proof on the subject, or led to the submission of the question to the jury, or to a direct ruling that nonoccupancy was sufficiently proved. *Under the circumstances, it would be most unjust to permit the defendant to dispute the sufficiency of the proofs in that behalf.*"

In *Gerhardt v. Swaty,* 57 Wis. 24, 14 N. W. 851, it is ruled that a party who does not object at the time to a question proposed to be submitted to the jury on the ground that it does not properly cover the case will be held to have assented to its submission in the form proposed. In *Wright v. Mulvaney,* 78 Wis. 89, 46 N. W. 1045, it was ruled that a party by whom a question was prepared and at whose request it was submitted

to the jury for a special verdict cannot be heard to allege the insufficiency of such question as a ground for a reversal of the judgment. In this case there was no general verdict in addition to the special verdict, and the court based its ruling on *Schultz v. C., M. & St. P. R. Co.* 48 Wis. 375, 4 N. W. 399. The omission was of an issuable fact on which the whole case might well turn.

With reference to waiver in general it is said in *Charles Baumbach Co. v. Hobkirk,* 104 Wis. 488, 80 N. W. 740, citing *Leonard v. Rogan,* 20 Wis. 540, that the right of trial by jury is waived by going to trial before the court without objection. Was not this precisely what was done by the appellant in the instant case with reference to his motion for judgment on the counterclaim? That the right of trial by jury may be waived was settled as early as *Millett v. Hayford,* 1 Wis. 401. In some of the later cases it seems to have been considered that the judgment had no support unless it could be maintained by the verdict aided by undisputed evidence. How this conclusion was arrived at does not appear. It has no basis in law. Upon what does a decree in chancery rest? A judgment of a justice of the peace? A judgment at common law in a case where a jury was waived? A judgment at law under the Code where findings are waived by failure to object or request? *Jones v. Jones,* 71 Wis. 513, 38 N. W. 88. Certainly there is nothing in the law to prevent a jury from deciding part of the issues in a case and the court deciding the remaining issues of fact, if the parties expressly consent thereto or if they do that which is equivalent to a consent thereto.

I think I have now shown: First, that the rule laid down in *Sherman v. Menominee River L. Co.* 77 Wis. 14, 45 N. W. 1079, and followed in some later cases, with reference to waiver is an impractical rule, difficult of application in most cases, almost impossible in many cases, that it has resulted in unnecessary reversals, much misunderstanding, and often in

injustice. Second, that there are two contradictory and conflicting lines of authority in this court upon the question of waiver of the right to have questions of fact determined by a jury. If this is correct there should, I believe, be no hesitation in at once adopting the rule contended for in this opinion. For the purposes of the instant case it is not even necessary to overrule any prior decisions of this court, because this case goes beyond any yet decided by this court in rejecting the doctrine of waiver. But even were it otherwise, considering the serious consequences of the rule in which this court finds itself now involved, to the effect that the objection that the special verdict does not cover all the issues of fact in the case is not waived by failure to object on that ground at the trial, or by failure to request that an additional finding be submitted to the jury, I should not hesitate to overrule to this extent *Sherman v. Menominee River L. Co.* 77 Wis. 14, 45 N. W. 1079, and the cases hereinbefore cited following it. They are not decisions upon which property rights have become fixed or settled. They are aptly described in *Whereatt v. Worth,* 108 Wis. 291, 295, 84 N. W. 442, where it is said:

"When, however, the rule of *stare decisis* is invoked to secure adherence to a wrong doctrine which may be corrected without prejudice to any one other than a party before the court, and others similarly situated as regards pending litigations, where no rule of property is required to be changed, courts are not so firmly bound by a previous ruling but that they may correct it with considerable freedom, if firmly convinced that it stands in need of correction."

See, also, *Pratt v. Brown,* 3 Wis. 603; *Hawks v. Pritzlaff,* 51 Wis. 160, 7 N. W. 303; *Sauer v. Steinbauer,* 10 Wis. 370.

MANSFIELD, C. J., said in the court of King's Bench in England in 1760:

"Where an error is established and has taken root, upon which any rule of property depends, it ought to be adhered to by the judges, till the legislature thinks proper to alter it, lest the new determination should have a retrospect, and shake

many questions already settled; but the reforming erroneous points of practice can have no such bad consequences, and therefore they may be altered at pleasure, when found to be absurd or inconvenient." *Robinson v. Bland,* 1 W. Black. 256, 264.

In *Stow v. Converse,* 4 Conn. 17, 30, it is said: "Even the sanction of precedent, however ancient and uniform, is never conclusive on a point of practice;" and in *Baker v. Madison,* 62 Wis. 137, 151, 22 N. W. 141, 583, it is said: "This being really a matter of practice, the maxim *stare decisis* has no application. When satisfied that adherence to any rule of practice will work injustice, the court will change or modify the rule to prevent the wrong, no matter how long it has been observed."

I believe it should have been held in the case at bar that the appellant waived his right to have the question of *par delictum* passed upon by the jury, that he submitted it to the court for determination, and that the court determined that fact against him upon sufficient evidence. Upon the mere erroneous disposition of this case I might have yielded to the judgment of the majority without dissent. But it is otherwise when the decision of the instant case continues and extends the scope of an unjust and impracticable rule injurious alike to public and private interest and tending to tie up this court in a mere web of sophistry of its own weaving.

SIEBECKER, J. I concur in the dissenting opinion of TIMLIN, J.

STAMNES and others, Respondents, vs. MILWAUKEE & STATE LINE RAILWAY COMPANY, Appellant.

February 19—March 19, 1907.

Railroads: Condemnation of mortgaged land: Award: Security not to be impaired: Evidence: Agreement by owner to convey: Admission as to value: Waiver.

1. Upon condemnation of a right of way for a railroad over mortgaged land the mortgage security is not to be impaired or diminished, and there must be a single award covering the entire injury to the estate, including both the value of the strip taken and the diminution, by reason of such taking, in the value of the land not taken.
2. An agreement by the owner of the land, made after the condemnation proceedings were begun, to convey the right of way and release all claims for damages in consideration of a certain sum was not admissible in evidence in order to bar an award of a greater sum. Such an admission as to value could not, in the condemnation proceeding, affect the right of the owner without also affecting the right of the mortgagee, and, not being admissible against the latter, it was not admissible at all.

[3. Whether by going on with the condemnation proceedings after obtaining such agreement the railway company waived its rights thereunder as against the owner, and whether upon being compelled to pay an award greater than the sum named in the agreement the company would have any remedy as against the owner or the land, not determined.]

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Proceedings to determine the compensation to be paid on account of land taken for railway purposes.

Appellant railway company being desirous of constructing its railway track across the premises of respondent *Jacob Stamnes,* which were mortgaged for the sum of $6,734.93, principal and interest, to the respondent *Jane Gittings,* obtained through the former and his wife the following agreement:

"Whereas, the construction of a railway is contemplated on a line which, as now located, crosses the land hereinafter described.

"Now, therefore, to aid in securing the location and construction thereof, and in consideration thereof, and of one dollar to me in hand paid, the receipt of which is hereby acknowledged, I do hereby covenant and agree for myself, my heirs, executors, administrators and assigns, to sell to *Milwaukee & State Line Railway Company* and assigns, a strip of land 120 feet in width, being 60 feet in width on each side of the center line of said railway, as located across my land in section 27 of township 4 N. range 22 E. in Racine county, state of Wisconsin, being the south ½ northeast ¼ of southwest ¼ sec. 26 and south ½ N. ½ S. E. ¼ sec. 27, and southwest ¼ S. E. ¼ sec. 27 of said section, hereby giving full power to said railway company or assigns, on the definite location of said railway, to enter upon the land and premises of the width aforesaid, and occupy, use and control the same, and construct said railroad thereon.

"And I further covenant, and agree, for myself, my heirs, executors, administrators and assigns, that upon the demand of said railway company or assigns, at any time within six months after the line of said railway has been definitely located across said land, I will convey to the said railway company or assigns, by warranty deed free and clear of all incumbrances and liens, the said strip of land; and will in and by said deed or by some other good and sufficient instrument, release and discharge said railway company or assigns from all claims for damages to my land by reason of the construction, operation and maintenance of said railway, all for the sum of twelve hundred and fifty ($1,250) dollars to be paid to me upon delivery of said deed.

"Provided, that this agreement is upon the express condition that the said railway shall be built across my said land. Owner to have one farm grade crossing.

"Should said railway not be constructed across my said land, then this agreement shall be null and void.

"Witness my hand and seal this 19 day of June, A. D. 1905.

"JACOB STAMNES. [Seal.]
"ANNA STAMNES. [Seal.]

"In presence of David G. Janes."

Appellant notwithstanding having obtained such writing proceeded to obtain its desired right of way by condemnation

proceedings, making the owner and mortgagee parties. In such proceedings an award of $2,000 was made for the value of the land taken and damages to the land not taken. There was a contest before such commissioners, carried on mainly by the mortgagee against the appellant, in which *Jacob Stamnes* admitted having made the writing referred to and testified that he considered $1,250 would cover the damages to his property not taken and the value of the land for the right of way. The railway company appealed from the decision of the commissioners to the circuit court. On a trial of the matter there had, appellant offered the contract before mentioned in evidence, and also offered to show what *Stamnes* testified before the commissioners, as affecting his interest, and as a bar to any recovery as to him exceeding $1,250. He was interrogated on the subject, as was also the stenographer who took his evidence on the first hearing. The contract and what he so testified to were rejected upon respondents' objection. The contest as against the appellant was carried on as before by the mortgagee. The jury on evidence tending to establish the same found that the value of the whole property affected by taking the right of way was $10,966.20, and that the value of the land taken and the damages to the land not taken was $2,400. Due exceptions were taken to the rulings of the court above mentioned. After verdict such proceedings were had as would preserve for consideration upon appeal the questions discussed in the opinion. Judgment was rendered in accordance with the verdict, from which judgment this appeal was taken.

Edward M. Hyzer, for the appellant.

For the respondents there was a brief by *Gittins & Burgess,* and oral argument by *E. E. Gittins* and *Roy Burgess.*

The following opinion was filed October 9, 1906:

MARSHALL, J. Counsel for appellant seems to concede, as the fact is, that the mortgage security could not be really im-

paired so as to bind the mortgagee by any mere agreement between the railway company and the mortgagor, or by any appraisal in condemnation proceedings without substituting for that taken a money equivalent, the mortgagee having an opportunity to be heard. The taking that must thus be made good to the mortgagee obviously covered the whole injury to the estate,not the mere value of the strip of land to be occupied by the right of way. That is what the statutes contemplate, sec. 1848, Stats. (1898), in providing that all parties interested in the condemnation proceedings must be notified, and impliedly must have leave to participate in such proceedings, and sec. 1853, Stats. (1898), providing for proceedings in favor of the mortgagee in case of a railway company obtaining title to real estate subject to a mortgage lien without having provided therefor. See, also, *Kennedy v. M. & St. P. R. Co.* 22 Wis. 581; *Aspinwall v. C. & N. W. R. Co.* 41 Wis. 474. We do not overlook the fact that sec. 1848 provides that in condemnation proceedings there shall be appraised the value of the land proposed to be taken and the damages that will be suffered by the owner by reason of the taking, but it seems plain that the term "damages to the owner" means the diminution of the value of the land not taken by direct injury thereto as to the whole ownership therein, legal and equitable. It has been held elsewhere under a system quite similar to ours that the award takes the place of the land as regards the mortgage (*Platt v. Bright,* 31 N. J. Eq. 81), and that the award in the condemnation proceedings is indivisible, covering the entire value of the land actually appropriated and the injury to the land not taken,—in other words, the entire injury to the estate by the exercise of the right of eminent domain. *Bright v. Platt,* 32 N. J. Eq. 362, 370. The foregoing is in accord with many authorities that might be cited. The following relate to the matter: *Utter v. Richmond,* 112 N. Y. 610, 613, 20 N. E. 554; *In re Eleventh Ave.* 81 N. Y. 436; *Baltimore & O. R. Co. v. Thompson,* 10 Md. 76; *Wood v. Westborough,*

140 Mass. 403, 5 N. E. 613; *Severin v. Cole,* 38 Iowa, 463; *Thompson v. C., S. F. & C. R. Co.* 110 Mo. 147, 19 S. W. 77; *Gerrard v. O., N. & B. H. R. Co.* 14 Neb. 270, 15 N. W. 231.

Two branches of appellant's argument, viz.: that the award is excessive and that the evidence of the mortgagor's declaration and the contract made with him before the commencement of the condemnation proceedings should have been admitted in evidence in order to bar any greater recovery as to him than $1,250, or at least to affect the amount of his recovery, are based on the theory that the mortgagee's interest could not be impaired so long as there was ample value left to secure him after the taking, if no larger sum was allowed as compensation therefor than the sum *Stamnes* had indicated would satisfy him. No authorities are cited to our attention to sustain either proposition. There are two seemingly conclusive answers to them. There could be, as we have before indicated, but one award. That was required to cover the whole value of the land to be occupied and the entire damages to the land not taken. It was not competent to make an award of one sum in favor of the mortgagee and another in favor of the mortgagor. The award as to the mortgagee was to take the place of the land taken, constructively or actually. The mortgagee had a contract right to the full benefit of the value covered by his mortgage till the mortgage indebtedness should be paid. No part of it could be legitimately taken from him without substituting therefor an equivalent. It was competent for him to stipulate for any amount of security he saw fit, and what he obtained it was not competent for the court to diminish without substituting the just compensation therefor contemplated by the constitution.

The contract made with the mortgagor before the condemnation proceedings were commenced, it seems, was, as respondent claims, a mere option agreement which appellant elected to abandon by commencing the condemnation proceedings. So, in any event, when such contract was offered in evidence as a

bar to any greater recovery as to the mortgagor than $1,250, it was properly rejected.

The law is familiar that the admissions of one of several persons jointly interested may be given in evidence as against all. That relates to situations where the one making the admission has a right to speak in some respects as agent for all. It does not apply to cases where there is a mere community of interest, or to situations where the one making the admission has no right whatever to speak for the others subsequently joined with him, as plaintiffs or defendants, in litigation respecting the subject involved. In those situations the admission is only admissible as evidence against the one making it. 1 Jones, Ev. § 254; *The New Orleans,* 106 U. S. 13, 1 Sup. Ct. 90; *Slaymaker v. Gundacker's Ex'rs,* 10 Serg. & R. 75; *Lane v. Doty,* 4 Barb. 530, 536; *McMillan v. McDill,* 110 Ill. 47; *Hammon v. Huntley,* 4 Cow. 493.

It would seem to be the logical result of the rule stated that where the admission, as here, sought to be established could not affect the right of the person making it without affecting the rights of others joined with him in the litigation it is not admissible at all, and such is the holding in the federal case cited and in *McMillan v. McDill, supra.* In the former in proceedings to determine for joint owners of a vessel damages caused thereto by another vessel, evidence of one of the owners given in another action was excluded, because not admissible as to the co-owners. In the latter case the subject is discussed at considerable length, it being stated as a general rule that where evidence of the declarations of one of several parties on the same side in litigation could only affect legitimately, in any event, himself and could not affect him without affecting his coparties it is not admissible. The reasoning of the court seems to cover fully the proposition before us. The court said:

"It was incompetent as against the other defendants, and as it could not affect the issue without affecting the other defendants it was in our judgment incompetent to go to the jury

on the issue involved. . . . If this was a case where a judgment could be rendered against one of the defendants without affecting the rights of the others there might be some ground for admitting in evidence the declarations as against the defendant who made them; but such is not the case. . . . Testimony which defeats one defendant—one devisee—defeats all, and a judgment against one necessarily defeats all. . . . If the admissions here could have gone to the jury and affected the rights of none but the one making them no error would have been committed, but such is not the case."

To the same effect is *Phelps v. Hartwell,* 1 Mass. 71, cited by the court in the opinion with numerous other authorities.

The foregoing covers all the matters presented for consideration by appellant. We have given particular attention to the claim that the damages awarded are excessive. It seems that such claim is based wholly on the ideas above disapproved that the interest of the mortgagor and that of the mortgagee are severable; that the former was willing to take $1,250 for all injury as to him by appellant's exercise of the right of eminent domain, and that so long as there was security enough left after the taking to satisfy the mortgage, the security was not impaired. It is not claimed but what there was evidence produced by the respondent mortgagee to sustain as large an award as that made. It follows that the judgment of the lower court must be affirmed.

By the Court.—So ordered.

The appellant moved for a rehearing, which, on December 4, 1906, was granted as to these propositions:

"The agreement with *Stamnes* being a valid contract made after the commencement of the condemnation proceedings:

"First, was it necessarily waived by prosecution of such proceedings?

"Second, if not so waived, was the agreement inadmissible in evidence for reasons stated in the opinion, but without prejudice to appellant's seeking a remedy for being compelled to pay for the right of way more than *Stamnes* agreed to take

therefor, through subrogation to the rights of the mortgagee to the amount of the excess?"

The cause was re-argued upon the above questions on February 19, 1907.

Edward M. Hyzer, for the appellant.

For the respondent there was a brief by *Gittins & Burgess,* and oral argument by *E. E. Gittins.*

The following opinion was filed March 19, 1907:

MARSHALL, J. Upon the former hearing it was held that the right-of-way agreement was an option which appellant elected to abandon by commencing the condemnation proceedings. That was assigned as one of the reasons for the conclusion that the agreement was not admissible in evidence. In reaching such conclusion it was assumed that the condemnation proceedings were initiated after the agreement was obtained, whereas they were commenced prior thereto. It is now argued on behalf of respondents that whether they were commenced before or after the agreement was made, the pursuit thereof thereafter constituted an election to thereby acquire the right of way and to abandon the option.

It may be that the pursuit of the condemnation proceedings, in view of the peculiar situation, might be regarded as less persuasive of an election to wholly abandon the option agreement, since it was in fact obtained during their pendency, than would be the case if such proceedings were commenced subsequent thereto, but we do not deem it necessary to discuss or decide the question.

It is the opinion of the court that the mere circumstance of appellant going on as it did with the condemnation proceedings, since it is plain that the mortgagee had a right to have an award made independently of the agreement with the mortgagor and insisted upon such right, did not necessarily constitute an election to waive all the rights as against the latter under the agreement. Whether there was such a waiver or

not may depend upon circumstances not appearing in the record of the trial and which were not relevant thereto. True, as a result of the condemnation proceedings appellant acquired its right of way. There was nothing left thereafter in respect to that matter which could be obtained under the agreement, but whether there was such a voluntary choice as to settling the question of the compensation to be paid for what was acquired and the resulting damages to lands not taken as to preclude appellant from any remedy for having been compelled to pay therefor a much larger sum than the mortgagor agreed to take, seems to be quite another question; one that has not been tried and one which, perhaps, it was not competent to try as an incident to the issue that was presented as to the mortgagee. Much might be said on this subject, but it is thought best to leave the matter as free as possible from anything not necessary to the decision of the main question on the appeal, which might prejudice the parties as to that which may form the subject matter of further judicial proceedings.

In short, it is the opinion of the court that whether all rights under the option agreement were waived by appellant was not necessarily involved in the trial resulting in the award complained of, and should not be determined upon this appeal, from the mere circumstance of its having pursued the condemnation proceedings after obtaining such agreement, concluding it from seeking such remedy as the law may afford against *Stamnes* or the property affected by the mortgage if it shall turn out that appellant preserved as against him some rights, legal or equitable, under such agreement. Whether appellant made an election fatal to its claiming any such rights, and if it did not what its remedy is to vindicate such rights, are matters not necessary or perhaps proper here to decide. The agreement was properly rejected when offered as evidence, entirely irrespective of whether it was still subsisting for some purpose.

The result of the foregoing is that the first proposition should be answered in the negative and the second in the affirmative, but without any suggestion that a remedy of the sort mentioned in the second proposition exists.

By the Court.—That part of the former decision in relation to the option agreement having been abandoned by the appellant is withdrawn, but otherwise such decision is adhered to. No costs will be allowed on the rehearing to either party.

FLANNIGAN, Respondent, vs. STAUSS, Appellant.

February 19—March 19, 1907.

Appeal: Exceptions to charge: Sufficiency: Excessive damages: Setting aside verdict: Slander.

1. An exception to a charge to the jury should challenge the propriety or legal accuracy of some definite proposition therein.
2. A general exception to the whole of a charge which embraces several distinct propositions is not available on appeal.
3. In a tort action for unliquidated damages a verdict will not be set aside on the ground that it is excessive unless the excess is such as to create the belief that the jury was misled by passion, prejudice, or ignorance.
4. A verdict awarding $500 damages for the speaking of slanderous words imputing unchastity to a woman is *held* not so excessive as to make it the duty of the court to set it aside, although there was evidence tending to show that the words were spoken in quarrel.

APPEAL from a judgment of the circuit court for Walworth county: E. B. BELDEN, Circuit Judge. *Affirmed.*

In an action for slander the respondent recovered a verdict for $500 against the appellant in the circuit court for Walworth county and judgment was accordingly entered, from which this appeal is taken.

For the appellant there was a brief by *Nath. Pereles & Sons,* and oral argument by *B. F. Williams.*

For the respondent there was a brief by *Ryan, Merton & Newbury,* and oral argument by *M. A. Jacobson.*

TIMLIN, J. The appellant assigns two errors for which he contends the judgment should be reversed.

"First. The court erred in its charge to the jury." This very general assignment of error is attempted to be supported by a very general exception as follows: "The above-named defendant . . . excepts to the judge's charge to the jury in the above entitled action." This exception was filed with the clerk, but is not incorporated in the bill of exceptions otherwise than by the following recital: "To which instructions the defendant duly excepted and which exception was in writing duly filed before the close of said term." In his motion for a new trial the only ground specified referring to this subject was, "Because the court erred in instructing the jury as indicated by written exceptions on file."

We have taken pains to quote these three several attempts at exceptions to the instructions because they well illustrate how assignments of error and exceptions ought not to be taken if they are intended to be effective. *Hamlin v. Haight,* 32 Wis. 237; *Thrasher v. Tyack,* 15 Wis. 256; *Corcoran v. Harran,* 55 Wis. 120, 12 N. W. 468; *Bouck v. Enos,* 61 Wis. 660, 21 N. W. 825; *Bigelow v. West Wis. R. Co.* 27 Wis. 478. An exception to a charge should challenge the propriety or legal accuracy of some definite proposition in that charge. If there be more than one erroneous proposition the safer way is to file an exception to each. With due regard for precedent we are consequently unable to examine or review any part of the instructions in question.

The second assignment of error is as follows: "The court erred in denying the defendant's motion for a new trial." The motion for a new trial specified six grounds, but the brief

of appellant states that this assignment of error is based on the ground that the damages awarded by the jury are excessive, and this is the only ground argued in support of that assignment of error. It is conceded that the words charged, if used, were actionable *per se*. There is also some evidence tending to sustain a claim for punitory damages. It is contended, in support of the claim that the damages are excessive, that the evidence shows the respondent to be "a woman extremely common, if not coarse." This is based upon the language alleged to have been used by her toward the appellant. It is well for the human race that female chastity is not peculiar alone to the educated and refined, but was also characteristic of the "common and coarse" mothers of the stout barbarians who laid the foundation of our present system of education and refinement, and who largely by their possession and preservation of this virtue became the master spirits of the world. It is, to say the least, no indication of decadence when the body of our people represented by the jury vigorously resent false and unfounded imputations against female chastity.

It is next contended that the alleged slanderous words were spoken in quarrel and this should have the effect of reducing the punitory damages. No doubt this is a proper consideration in mitigation of damages, but the questions presented to this court are quite different from the ordinary consideration of mitigating circumstances by a jury. It is said in *Donovan v. C. & N. W. R. Co.* 93 Wis. 373, 67 N. W. 721, that in an action for unliquidated damages arising from a tort the court is not at liberty to set aside a verdict on the ground that it is excessive unless the excess is such as to create the belief that the jury have been misled either by passion, prejudice, or ignorance. Applying this test to the verdict in question there is no ground of reversal.

By the Court.—The judgment of the circuit court is affirmed.

KRADWELL and others, Respondents, vs. THIESEN and another, Appellants.

February 19—March 19, 1907.

Contracts: Restraint of trade: Validity: Transfer of good will: Sale of corporate stock: Breach: Temporary injunction: Discretion.

1. A contract in general restraint of trade is void as being against public policy; but a particular restraint of trade within reasonable limits, having regard to the interests of the party contracted with, is valid.
2. An agreement by the vendor of shares of stock in a drug company that he would not either directly or indirectly, in his own name or as stockholder or as agent, engage in the business of selling drugs either at wholesale or retail, or conduct a drug store, in the same city for a period of five years, did not impose a restraint larger than was reasonable for the protection of the purchasers, and was valid.
3. The fact that the sale of the stock did not transfer any title to the good will of the business—that being the property of the corporation itself—did not render the agreement invalid.
4. Upon a showing that the vendor in such case had, within the time limited, entered the employ of another drug company in the same city and had assisted in the management of the business of said company, the granting of a preliminary injunction restraining him from doing any of the things which he had agreed not to do was not an abuse of discretion.

APPEALS from orders of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This is an action to restrain the defendant *Thiesen* from selling drugs or conducting a drug store in Racine, contrary to his agreement with the plaintiffs executed June 23, 1903. It appears and is undisputed that for some time prior to February 9, 1895, *Thiesen* owned and operated a drug store in Racine under his own name. February 9, 1895, the Robinson Drug Company was incorporated with *Thiesen* as one of its stockholders and directors, and thereupon *Thiesen* conveyed and transferred to the said Robinson Drug Company all

of his interest and good will in his drug business in Racine. January 1, 1900, the corporate name of the association was by amendment changed to the Kradwell-Thiesen Drug Company; and the association continued to do such drug business in that name in Racine until January 26, 1905. While so doing business and while said *Thiesen* and the three *Kradwells* (plaintiffs) owned capital stock in that association, *Thiesen* agreed to sell and transfer his forty-five shares of such stock to the three *Kradwells* mentioned, or some of them, for $5,000 then paid, in consideration of which, and as a part of the same agreement, the said *Thiesen* then and there under his hand and seal agreed and bound himself in writing with the said *Kradwells* that for and during a period of five years from and after June 23, 1903, being the date of the agreement first mentioned, he would not either directly or indirectly, in his own name or as stockholder or as agent, engage in the business of selling drugs either at wholesale or retail, or conduct a drug store, within the corporate limits of Racine.

It appears that at the time of the commencement of this action, June 12, 1906, the *Kradwells* were, and still are, the sole owners of the capital stock of the plaintiff *Kradwell Drug Company* [formerly Kradwell-Thiesen Drug Company]; that for at least thirty days immediately preceding the commencement of this action the defendant *Thiesen* had openly breached and broken his said contract of June 23, 1903, and by the procurement of the defendant *Red Cross Drug Company,* acting with full knowledge of such agreement, engaged with said last-named company as its manager or managing agent or superintendent in charge of the stores of that company in Racine, and also had assisted that company in the management of its business. Upon an order to show cause and hearing had, the trial court on July 17, 1906, granted a temporary injunction restraining the defendant *Thiesen* from doing any of the things he had agreed not to do in his agreement of June 23, 1903, upon giving the undertaking therein

prescribed. From such injunctional order the defendant *Thiesen* appeals.

August 1, 1906, the complaint was amended, making the allegations somewhat stronger as to the *Red Cross Drug Company*. To such amended complaint each of the defendants separately demurred, and each of such demurrers was by a separate order overruled by the court, and from such orders overruling the same the defendants separately appeal.

For the appellants there was a brief by *Palmer & Gittings*, attorneys, and *James G. Flanders*, of counsel, and oral argument by *Mr. C. C. Gittings* and *Mr. Flanders*. They contended, *inter alia*, that the complaint does not show a breach of the contract. An allegation that the defendant *Thiesen* is manager or managing agent or superintendent in charge of stores, if it can be treated as an allegation that he acts in either of these capacities, does not bring the case within the terms of the contract. *Battershell v. Bauer*, 91 Ill. App. 181; *Grimm v. Warner*, 45 Iowa, 106; *Eastern Exp. Co. v. Meserve*, 60 N. H. 198; *My Laundry Co. v. Schmeling*, 129 Wis. 597, 109 N. W. 540.

For the respondents there was a brief by *Simmons, Nelson & Walker* and *Kearney, Thompson & Myers*, and oral argument by *W. D. Thompson* and *John B. Simmons*. They argued, among other things, that an agreement by a stockholder, on the sale of his stock in a corporation, whether to another stockholder or to a third person, not to engage in a similar business for a limited time and in a limited territory, is valid and enforceable in favor of the corporation. The purchase of the stock is a sufficient consideration to support the agreement. *Up River Ice Co. v. Denler*, 114 Mich. 296, 72 N. W. 157, 159, 68 Am. St. Rep. 480; *Nat. E. & S. Co. v. Haberman*, 120 Fed. 415, 422; *Knapp v. S. Jarvis Adams Co.* 135 Fed. 1008, affirming *S. C.* 121 Fed. 34. As to what constitutes a violation of an agreement such as the one in question, see *Nelson v. Johnson*, 38 Minn. 255, 36 N. W. 868;

Finger v. Hahn, 42 N. J. Eq. 606, 8 Atl. 654; *Richardson v. Peacock,* 28 N. J. Eq. 151, 155; *Guerand v. Dandelet,* 32 Md. 561, 3 Am. Rep. 164, 167, 170; *Davis v. Barney,* 2 Gill & J. 382, 402; *Heichew v. Hamilton,* 4 G. Greene, 317; *Pohlman v. Dawson,* 63 Kan. 471, 88 Am. St. Rep. 249; *Pittsburg S. & R. Co. v. Pa. S. Co.* 208 Pa. St. 37, 57 Atl. 77; *Duffy v. Shockey,* 11 Ind. 70, 71 Am. Dec. 348, 350; *Knapp v. S. Jarvis Adams Co.* 135 Fed. 1008, 1014.

CASSODAY, C. J. The principal controversy in this case is as to whether the written agreement of June 23, 1903, "is absolutely void as a matter of law." The contents of the agreement are sufficiently set forth in the foregoing statement. Counsel for the defendant is undoubtedly right in claiming that "a contract in restraint of trade is presumably void as against public policy." The general rule, as deduced from the English adjudications, seems to be:

"A contract in general restraint of trade is illegal and void as being against public policy; but a particular restraint of trade within reasonable limits, having regard to the protection of the interests of the party contracted with, is valid." *Mallan v. May,* 11 M. & W. 653, 6 Eng. Rul. Cas. 392.

The adjudications of this court are in harmony with the rule stated. *Washburn v. Dosch,* 68 Wis. 436, 32 N. W. 551; *Richards v. Am. D. & S. Co.* 87 Wis. 503, 512, 58 N. W. 787; *Palmer v. Toms,* 96 Wis. 367, 369, 71 N. W. 654; *Cottington v. Swan,* 128 Wis. 321, 107 N. W. 336; *My Laundry Co. v. Schmeling,* 129 Wis. 597, 109 N. W. 540, 545, 546. As stated by Mr. Justice PINNEY in the *Richards Case,* cited, such contract is not void in case it is "founded upon a valuable consideration and limited, as regards time, space, and the extent of the trade, to what is reasonable under the circumstances of the case." There is no ground for claiming that the contract in question is general or unlimited. On the contrary, it is by its terms expressly limited to the business of

selling drugs or conducting a drug store in Racine during the five years mentioned. The argument seems to be that the only legitimate basis for the agreement was to protect the good will of the business, which belonged to the *Kradwell Drug Company* and not to its stockholders; and hence, as *Thiesen* was a mere stockholder, the sale of his stock to the *Kradwells* did not include any interest in the good will or other property of the corporation to be thus protected. Two cases are cited in support of such contention. *Merchants' Ad-Sign Co. v. Sterling,* 124 Cal. 429, 57 Pac. 468, 46 L. R. A. 142; *Dodge S. Co. v. Dodge,* 145 Cal. 380, 78 Pac. 879. In respect to these cases it is enough to say that they were based upon the statutes of that state, which declare that "every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, *otherwise* than is provided by the next two sections, *is to that extent void.*" One of such sections provides that "one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein." Those cases simply held that as there had been no sale of the good will, within the meaning of such statute, the contract in restraint of trade was expressly prohibited by the statute. We are governed by no such statute. The test which has repeatedly received the sanction of this and other courts was expressed by TINDAL, C. J., in these words:

"We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on

the grounds of public policy." *Horner v. Graves,* 7 Bing. 735, 743. See *Trego v. Hunt* [1896] A. C. 7; *Richards v. Am. D. & S. Co.* 87 Wis. 503, 513, 58 N. W. 787; *Milwaukee M. & B. Asso. v. Niezerowski,* 95 Wis. 129, 134, 135, 70 N. W. 166; *Diamond M. Co. v. Roeber,* 106 N. Y. 473, 482, 13 N. E. 419.

The facts in the case at bar are quite similar to those in a recent Michigan case wherein it is held that "the purchase by an individual of a stockholder's interest in a corporation affords a sufficient consideration for a contemporaneous agreement by the seller not to engage in the business carried on by the corporation." *Up River Ice Co. v. Denler,* 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480. The *Kradwells* owned the stock of the corporation. As such they were interested in the success of the corporation. They bought *Thiesen's* stock and paid him his price. They were entitled to the protection given by the agreement. We must hold that the agreement in question is valid and binding between the parties.

Among other things, the original complaint alleges, as a breach of the contract, in effect, that said *Thiesen,* at the procurement of the defendant *Red Cross Drug Company* and with full knowledge on its part of the terms and conditions of said contract, engaged with that company as manager or managing agent or superintendent in charge of the stores of that company at Racine. It seems to be conceded that a short time prior to the commencement of this action the defendant *Thiesen* was employed by the *Red Cross Drug Company,* and, among other things, had "also assisted in the management of the business of said company." We do not feel called upon to go into details. They will be revealed upon a full hearing upon the merits. The matter of granting a preliminary injunction was necessarily addressed to the sound discretion of the trial court. Upon the facts stated we cannot say that there was any abuse of such discretion in granting the injunctional order appealed from.

The amended complaint states facts sufficient to constitute a cause of action for the breach of such contract, not only against the defendant *Thiesen* but also against the *Red Cross Drug Company.*

By the Court.—Each of the three orders of the circuit court appealed from is affirmed.

STATE EX REL. FABER, Respondent, vs. HINKEL, City Clerk, Appellant.

February 20—March 19, 1907.

Intoxicating liquors: Licenses: Fixing amount: Milwaukee city charter: General laws applicable to Milwaukee: **Mandamus:** ***Judgment of dismissal as bar to subsequent action.***

1. Since the enactment of ch. 307, Laws of 1883 (amending the Milwaukee city charter), all general laws affecting liquor licenses apply to the city of Milwaukee unless in themselves they show a legislative purpose to the contrary.
2. Ch. 296, Laws of 1885—secs. 1548, 1548*b*, Stats. (1898)—as to the amount of the license fee and as to the manner of increasing that amount, is applicable to the city of Milwaukee.
3. Ch. 296, Laws of 1885, prescribed a fixed sum ($200) as the license fee, and when at an election as therein prescribed a majority vote is cast in favor of a higher sum, such latter sum is "required by the general law."
4. In case of such a result of an election in the city of Milwaukee, the charter itself, as amended by ch. 307, Laws of 1883, commands the common council to charge the higher sum for licenses.
5. Where in a *mandamus* action to compel a city clerk to give notice of a special election as provided in sec. 1548*b*, Stats. (1898), the petition was dismissed for failure of the relator to amend it after the overruling of a demurrer to the return, there being no decision on the merits, the judgment of dismissal is not a bar to a subsequent similar action by the same relator against the same person as city clerk, based upon another request for a special election.

APPEAL from a judgment of the circuit court for Milwaukee county: GEORGE CLEMENTSON, Judge. *Affirmed.*

Mandamus to compel appellant, as city clerk, to call a special election for the purpose of voting upon the amount of license fee for sale of liquors in Milwaukee, in accordance with sec. 1548*b*, Stats. (1898). The return conceded the filing of the petition in accordance with that section and the refusal of the appellant to so act on the ground that such section had no application within the city of Milwaukee and because the common council had already fixed the license fee at $200. Such return also set out a previous similar suit for *mandamus* by this same relator, duly determined adversely to him by judgment of the superior court of Milwaukee county, remaining unreversed. The proceedings in that *mandamus* action, set forth in the answer, disclosed that to an entirely similar petition and writ the defendant then, as now, as city clerk, had returned his refusal to call the election on the ground of the inapplicability of said general statute to the city of Milwaukee, and the relator demurred to said return as not stating facts sufficient to constitute a defense, after hearing on which the court entered order that the demurrer be overruled and the alternative writ be quashed and a judgment be entered unless the relator served an amended petition and alternative writ and pay costs within the time limited. It is alleged that judgment was entered in accordance with such order.

To the return in this case the relator demurred, and the court sustained that demurrer by order reciting that it appeared that the issue could not be varied by any further pleading and ordering judgment, whereupon judgment was entered for a peremptory writ commanding the defendant as city clerk to call and notify a special election in the manner required by sec. 1548*b*, and adjudging recovery of costs by the relator against the defendant, from which judgment the city clerk appeals.

For the appellant there was a brief by *Carl Runge,* attor-

ney, and *Austin, Fehr & Gehrz,* of counsel, and oral argument by *W. H. Austin.*

For the respondent there was a brief by *C. H. Hamilton,* and oral argument by *Mr. Hamilton* and *Mr. C. J. Faber.*

DODGE, J. 1. This case presents for consideration the construction of ch. 296, Laws of 1885, now in substance embodied in secs. 1548, 1548*b,* Stats. (1898), with reference merely to the inclusion or exclusion of the city of Milwaukee under its application. That act, by the first section, now sec. 1548, provided for the granting of licenses by village or town boards and common councils of the respective towns, villages, and cities, and provided that the sum to be paid for such franchises, "subject to the right to increase the same as in this chapter provided," be in cities $200, and contained various provisions as to the method of granting and the term of the license, the giving of bond, etc. By sec. 3, now sec. 1548*b,* it was provided that the electors of the several cities, villages, and towns in the state may hold special elections for the purpose of determining the amount to be paid for license, and, for that purpose, it was made the duty of the city clerk of every city, on request to him in writing by at least twelve qualified voters, to forthwith give notice of a special election for that purpose to be held on the third Tuesday of September. The section prescribed the manner of holding the election, the form of ballots, and provided that the amount to be voted on might be either $200, $350, or $500, the figure receiving the highest number of votes to be held and considered the sum to be paid for such license within said city for the three years succeeding the first Tuesday in May thereafter.

From the original organization of the state, and indeed before, Milwaukee had existed under a special charter which conferred power upon the board of aldermen with reference to licenses. At some periods of time the amount of the fee had been specified by statute, and at other times a maximum

and minimum had been specified within which the aldermen might fix it. The charter had persistently contained, and still does contain, the provision that the general powers granted to the common council should exist, "anything in any general law of this state to the contrary notwithstanding;" and, also, "No general law of this state, contravening the provisions of this act, shall be considered as repealing, amending or modifying the same, except such purpose be expressly set forth in such law." Meanwhile various statutes had been enacted with reference to the granting of liquor licenses generally in the state, either fixing the fee or fixing limits within which it might be varied by local authorities, and had uniformly been deemed not to control the subject in Milwaukee, nor, indeed, in other cities in the state having special charters with express provision on the subject. In 1882, by ch. 322, a somewhat general revision of the subject throughout the state was had fixing the limits between $75 and $200. In 1883, by ch. 307, the charter of Milwaukee was amended by striking out the limits of the license fee existing therein and inserting the following: "Provided, the amount to be charged for any such license shall not, in any case, be less than the minimum sum nor more than the maximum sum required by the general laws of this state to be paid for like licenses in its towns and villages of the state, under the general laws, which are hereby made applicable to all licenses granted hereunder." And such provision still continues in force.

The conclusion seems to us unavoidable that the amendment to the charter in 1883 was intended to so limit and modify the clauses therein excluding from application to Milwaukee all general laws not expressly declaring a purpose to amend its charter, to the extent that all general laws affecting liquor licenses shall not be so excluded unless in themselves showing a legislative purpose not to apply to Milwaukee. In the act of 1885 we can discover no evidence of such intent. By its terms it applies generally to the cities of the state, and Milwaukee is in that category. That the legislature intended

the act to affect cities having special charter provisions on the subject of licenses is indicated by the provision in the last section that the act should not serve to lower any existent license fee established by charter or ordinance in any city. In the presence of such obvious legislative intent we cannot but hold that the act of 1885 as to the amount of the license fee and as to the manner of increasing that amount applied to Milwaukee. A few cases, far less clear, where such conclusion has been reached, may be cited. *Brightman v. Kirner,* 22 Wis. 54; *State v. Fisher,* 33 Wis. 154; *Raymond v. Sheboygan,* 76 Wis. 335, 45 N. W. 125; *State ex rel. Risch v. Trustees,* 121 Wis. 44, 52, 98 N. W. 954; *Dahlman v. Milwaukee, post,* p. 427, 110 N. W. 479. Of course, whatever the scope of ch. 296, Laws of 1885, the same must be accorded to the same provisions merely continued in force by embodiment in the revision of 1898 (secs. 1548, 1548*b*). See sec. 4985, Stats. (1898).

2. From another starting point the same conclusion must be reached for reasons not argued. The amendment to the charter (ch. 307, Laws of 1883) contained:

"Provided the amount to be charged for any such license shall not in any case be less than the minimum sum nor more than the maximum sum required by the general laws."

Obviously, if a general law prescribed a fixed sum, and not, as then, a limit of range, such sum would be both maximum and minimum, and must be charged. It seems clear that ch. 296, Laws of 1885, did just this. It declared that whenever the people of a given city should omit to vote otherwise the sum should be $200, neither more nor less. It also provided that where, in manner prescribed, a majority vote at a special election should be cast in favor of either $350 or $500, such sum should be charged. When such an event occurred, the general law itself required a specified sum. This was clearly a local-option law of the class fully discussed and explained in *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869, which, potentially existent at all times over the whole state,

was to take practical effect in any specific locality upon the happening of the event of a special election. The people at such election were not empowered to legislate, but create or declare the fact upon which became effective the behest of the legislature that the sum to be charged for a license shall be $350 to $500, according to such fact. Such behest was a general law. *State ex rel. Att'y Gen. v. O'Neill,* 24 Wis. 149; *Smith v. Janesville,* 26 Wis. 291; *In re North Milwaukee,* 93 Wis. 616, 67 N. W. 1033; *Davey v. Janesville,* 111 Wis. 628, 635, 87 N. W. 813; *Nash v. Fries,* 129 Wis. 120, 108 N. W. 210; *State ex rel. Maggard v. Pond,* 93 Mo. 606, 6 S. W. 469. Hence, whenever the people of Milwaukee shall, at a properly held special election, establish the fact of a majority sentiment in favor of one of the higher sums, that sum will be "required by general law," in the very words of the charter, and by that charter itself the common council will be commanded to charge that sum and no other. For both reasons above stated we hold that sec. 1548*b* imposes a clear and imperative duty upon the city clerk to give notice of a special election in manner and form defined, upon presentation of a written request complying with that section, and that such duty should be compelled by *mandamus* if not performed voluntarily. *Neu v. Voege,* 96 Wis. 489, 71 N. W. 880; *State ex rel. Spence v. Dick,* 103 Wis. 407, 409, 79 N. W. 421.

3. Some contention is made that the present action is barred because of the dismissal of a similar action instituted by the same relator and against the same person as city clerk, to compel similar action the year previous, upon another request for a special election. Without passing upon the binding effect of a judgment between parties situated as these are, one as a champion of public interests and the other as a public officer, and affecting another, though similar, official act, it suffices to point out that this and the former proceeding are based on different causes of action. Hence the judgment in

the former is a bar, at most, only as to such matters as affirmatively appear to have been actually decided. The judgment in the former case was merely a dismissal for failure of the relator to amend his petition after the overruling a demurrer to the return. It suggests no decision on the merits, and therefore, in and of itself, is no bar to this action or to consideration of the questions now decided. *Wentworth v. Racine Co.* 99 Wis. 26, 74 N. W. 551; *Grunert v. Spalding,* 104 Wis. 193, 80 N. W. 589; *Montpelier S. B. & T. Co. v. School Dist.* 115 Wis. 622, 635, 92 N. W. 439; *Pereles v. Gross,* 126 Wis. 122, 132, 105 N. W. 217.

By the Court.—Judgment affirmed.

BROWN and another, Appellants, vs. SEARCH, Respondent.

February 20—March 19, 1907.

Contracts: Rescission: Fraud: Materiality of false representations: Estoppel.

1. Upon being solicited by plaintiffs' agent, defendant declined to make a contract for the attendance of his daughter at plaintiffs' business college unless some of her former classmates in school should attend the college at the same time, and was thereupon induced to make such a contract by false representations of the agent that he had secured similar contracts from the parents of several of the daughter's classmates, naming three of them specifically. *Held,* that such representations were relevant and material to the negotiations and constituted a fraud which warranted defendant in rescinding the contract.
2. Defendant's refusal to send his daughter to the college or to make any payment after learning of such fraud was in effect a repudiation of the contract and, the contract being wholly executory and plaintiffs not having changed their position or incurred any liability on account of it, defendant was not estopped to set up the fraud as a defense to an action on the contract.
3. The fact that plaintiffs had paid their agent for his services in securing the contract from defendant did not affect defendant's rights.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

An action to recover the amount due under the following written agreement:

"Milwaukee, Wis., July 22, 1902.

"Received of *H. A. Brown* and *W. W. Way,* proprietors of the Cream City Business College, a certificate of tuition for a 12 mo. course of instruction in the day session of the Cream City Business College, Milwaukee, Wis., for which I agree to pay said Brown & Way, or order, the sum of one hundred twenty dollars ($120.00) as follows: $10.00 on the 1 of Sept., 1902, and $10.00 on the 1 day of each succeeding month thereafter until all is paid.

"Value received.

"(Name) FRANK SEARCH,

"Jno. J. Dalton. (Address) 469 Greenbush St."

The certificate mentioned in the above instrument was as follows:

"No. ——. Certificate of Tuition. $——.

"Cream City Business College.

"Mack Block,

"Milwaukee, Wis.

"This certifies that Laura Search is entitled to a twelve months' course of instruction in the business and shorthand departments of this institution, day session, in consideration of the payment of one hundred twenty ($120.00) dollars and subject to the rules and regulations of the college, said course to begin on or about the first day of September, 1902.

"Given under our hands & seal this 22nd day of July, 1902.

"H. A. BROWN, .

"W. W. WAY,

"Proprietors.

"Per Jno. J. Dalton."

Plaintiffs conducted the Cream City Business College, and were prepared to furnish defendant's daughter the instruction specified in the written certificate.

Defendant admits the making and execution of the agreement, but alleges that plaintiffs' agent, Jno. J. Dalton, induced him to make and execute it through false and fraudu-

lent representations. He pleads such fraud in defense of its enforcement in this action.

It appears that Jno. J. Dalton was the authorized agent of plaintiffs in the negotiations with defendant. Mr. Dalton called on defendant with a view to obtaining from him his agreement to send his daughter to this business college. During the negotiations defendant informed Dalton that he expected to have his daughter attend a business college, but that he wished to have her attend a college where some of her classmates from the school she had recently attended would attend. Thereupon Dalton informed him that he had obtained and secured contracts from parents of several of his daughter's classmates, naming three of them specifically, and that these classmates would attend plaintiffs' college in the succeeding September. Defendant, relying on these representations, agreed and made the contract sued on, stipulating orally that, if the daughter's classmates did not so attend the college, he would not be bound by the contract. It further appears that, in truth and fact, Dalton had not obtained any contracts from the parents of such classmates of defendant's daughter, and that none of the classmates referred to attended plaintiffs' business college as Dalton had represented their parents had contracted to have them attend.

In the succeeding October, when defendant and his daughter learned that none of her classmates specified in the negotiations with Dalton were in fact attending plaintiffs' college, defendant declined to have his daughter attend and receive the instruction agreed upon in the written contract, remailed the contract to plaintiffs' address, and refused to pay any of the sums specified in the contract. Plaintiffs testified that they never received the written contract defendant claims to have mailed them, that they had no knowledge of any of the alleged misrepresentations of their agent, Dalton, and that they were conducting the business college referred to in the contract and certificate.

The court submitted to the jury the questions whether there

was a conditional delivery of the contract, and whether defendant was induced to make the contract through the false and fraudulent representations of the plaintiffs' agent, Dalton. The jury found for the defendant, and judgment was awarded in his favor upon the verdict. This is an appeal from such judgment.

For the appellants there was a brief by *W. E. & F. P. Burke,* and oral argument by *Louis A. Lecher.* To the point that no legal fraud was shown, they cited 14 Am. & Eng. Ency. of Law (2d ed.) 140; Elliott, Ev. § 2137; 1 Bigelow, Fraud, 497; *Williams v. McFadden,* 23 Fla. 143, 11 Am. St. Rep. 345; 3 Sutherland, Dam. 584, 585 (3d ed. § 1167); *Hall v. Johnson,* 41 Mich. 286, 2 N. W. 55, 57, 58; *Davis v. Davis,* 97 Mich. 419, 56 N. W. 774; *Britton v. Supreme Council R. A.* 46 N. J. Eq. 102, 19 Am. St. Rep. 376–382; *Am. Bldg. & L. Asso. v. Bear,* 48 Neb. 455, 67 N. W. 500; *Castleman v. Griffin,* 13 Wis. 535, 538; *Barber v. Kilbourn,* 16 Wis. 485, 489; *Foster v. Taggart,* 54 Wis. 391, 393; *McDonald v. Daniels,* 58 Wis. 426, 428, 429; *Mamlock v. Fairbanks,* 46 Wis. 415, 416–418.

Fred Doering, for the respondent.

SIEBECKER, J. It is averred that plaintiffs were entitled to a direction of judgment in their favor upon the ground that the evidence in the case failed to show either a conditional delivery of the contract by defendant to plaintiffs' agent, Dalton, or that such agent had committed any fraud by which defendant was induced, as claimed, to make, execute, and deliver it. The proof of the delivery of the contract is undisputed, and we find nothing in the evidence to show that the contract was not to be effective unless some future specified act was performed or some event occurred. No evidence aside from that of defendant was offered on this subject, and from that testimony it is clear that the delivery of the contract to Dalton in its completed form was not a conditional de-

livery, but that the contract was executed and delivered as a completed agreement. So far as delivery was concerned, nothing further was required to complete it and make the agreement effective between the parties. Under these circumstances it devolved on the court to declare that there was a delivery of the contract to plaintiffs' agent.

In respect to the fraudulent conduct of plaintiffs' agent, which defendant alleges induced him to make and execute the contract, plaintiffs claim that the undisputed facts and circumstances show that the negotiations between Dalton and defendant, resulting in this contract, were free from any material misrepresentations by Dalton, and therefore no grounds have been shown for an avoidance of the contract by defendant. The proof is uncontradicted that defendant declined to make a contract for the attendance of his daughter at plaintiffs' college unless her classmates at the school she had theretofore attended should attend plaintiffs' college at the same time; that Dalton thereupon represented to defendant that such classmates had determined to attend plaintiffs' college for a course of instruction, and that he had secured contracts to that effect from the parents of three classmates, naming them; and that defendant was thereby induced to make, execute, and deliver the contract sued on. The falsity of these representations is not disputed, but it is averred that they do not constitute a representation material to the transaction embodied in the contract, and therefore do not constitute a fraud and cannot affect its validity. The representation was clearly germane to the transaction, and obviously was of such weight and importance to defendant as to induce him to bargain for a course of instruction for his daughter in plaintiffs' college. The association with her former classmates while attending plaintiffs' college was a matter of such substantial importance to defendant that he was justified in allowing it to determine his conduct in the transaction. This made the misrepresentation relevant and material to the negotiations, and furnished a

substantial basis for the perpetration of a fraud. It also appears that the evidence on this issue is not in conflict, and it shows that the misrepresentation was made by Dalton and that it induced defendant to make and deliver the contract. The facts and circumstances showing fraud are so clear as to exclude any different inference from them, thus leaving nothing for the jury to determine, and called upon the court to decide as matter of law that the alleged fraud was established. *Pratt v. Darling,* 125 Wis. 93, 103 N. W. 229; *Palmer v. Goldberg,* 128 Wis. 103, 107 N. W. 478, and cases cited.

Under the terms of the contract, to compensate plaintiffs for giving his daughter a twelve months' course of instruction in their business college, defendant obligated himself to pay them the sum of $120 in monthly instalments of $10, beginning on September 1st succeeding its execution in July. In the early part of October following defendant's daughter was prepared to enter upon the course of instruction, and then defendant became informed that none of her classmates were in attendance at the college as Dalton had represented they would be. Defendant thereupon omitted to comply with the agreement and refused to pay the amounts due and to have his daughter attend the college. He also claims to have mailed his copy of the contract to plaintiffs, but they testify that they never received it. No further steps were taken by either party to the contract until this action was commenced to enforce payment.

It is urged that defendant is estopped from interposing the defense of fraud for failure to give notice of rescission. This is claimed upon the well-established principle that, if a party to an agreement seeks total rescission on account of the fraud of the other party, upon being informed of the fraud he must repudiate the transaction promptly and return what he has received, in order to place the opposite party as nearly *in statu quo* as the circumstances will reasonably permit. The defendant omitted to comply with the terms of the agreement.

At the time of such failure plaintiffs had not parted with anything in reliance on it, and it is not shown that they incurred any liability on account of it. Presumably they stood in readiness to perform their part of the agreement in September if defendant should choose to enforce it. Up to this time the contract was an executory one. Defendant's failure to comply with its terms was, in effect, a repudiation of it, and left plaintiffs, in relation to the contract, in the same position they were in at the time it was made. It does not appear that they thereafter changed their position in relation to it, or that they incurred any liability on account of it. The action of the defendant in refusing to send his daughter to the college and to pay the instalment as required by the terms of the agreement clearly informed plaintiffs that he refused affirmance of the contract, and left the parties practically in their original positions up to the time action was commenced. Under these circumstances nothing has transpired to operate as a waiver of the right of defendant to assert the fraud in avoidance of the agreement. 1 Page, Cont. § 136; 2 Parsons, Cont. (9th ed.) 780; 1 Bigelow, Fraud, 434 *et seq.; Zang v. Adams,* 23 Colo. 408, 48 Pac. 509.

Exception was taken to the ruling by which the court excluded proof of payment by plaintiffs to Dalton for his services in securing this contract. It is to be presumed that they paid for such services, but this fact can in no way affect plaintiffs' or defendant's rights under the issues in this case. Upon the considerations above stated defendant was entitled to judgment in his favor.

By the Court.—Judgment affirmed.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Respondent, vs. GOLDSMITH, imp., Appellant.
SAME, Appellant, vs. SAME, imp., Respondent.

February 20—March 19, 1907.

Mechanics' liens: Foreclosure sale: Title acquired by purchaser: Inchoate dower right previously acquired by mortgagee: Privity.

1. After the entry of judgment of foreclosure of a mortgage of land executed by the owner and his wife, the mortgagee was made a party to an action to foreclose certain mechanics' liens and judgment was entered therein adjudging that said liens were prior to all other claims, that the premises be sold to satisfy said liens, and that on sale the rights of all parties, including the mortgagor and mortgagee, be barred and foreclosed. Thereafter at the sale on foreclosure of the mortgage the premises were purchased by the mortgagee, and afterwards they were sold under the judgment of foreclosure of the mechanics' liens. *Held*, that under the sale on foreclosure of the mortgage the mortgagee acquired the interest of the mortgagor discharged of all inchoate right of dower in the mortgagor's wife, and that such inchoate right of dower was not revived by the foreclosure of the mechanics' liens, but, under secs. 3321, 3324, 3326, Stats. (1898), passed to the purchaser at the mechanic's lien sale.
2. Privity between the mortgagee and the purchaser at the mechanic's lien sale was established by the statutes mentioned.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed on defendant's appeal; reversed on that of plaintiff.*

This action was brought by the plaintiff, *Connecticut Mutual Life Insurance Company,* June 24, 1898, to foreclose a mortgage upon the property described in the complaint, situate in the city of Milwaukee, Wisconsin, against the appellant *Alpha O. Goldsmith,* impleaded with others. The facts in the case, so far as they have any bearing upon the questions necessary to consider on these appeals, are few, simple, and undisputed.

On November 25, 1891, prior thereto, and thereafter the defendant Bernard Goldsmith was the owner of the premises in question. On November 25, 1891, various mechanics' liens attached to the premises. On June 17, 1893, defendant Bernard Goldsmith and appellant *Alpha O. Goldsmith,* his wife, mortgaged the premises to the plaintiff to secure $190,000 and interest, which mortgage was duly recorded. On August 10, 1893, suits were commenced for the foreclosure of the mechanics' liens existing against the premises. On October 21, 1893, defendant Bernard Goldsmith and appellant *Alpha O. Goldsmith* mortgaged the premises to B. K. Miller, trustee, to secure $175,000. On July 31, 1896, Miller, trustee, brought suit to foreclose his mortgage above referred to, and duly joined as defendants the defendant herein Bernard Goldsmith and appellant *Alpha O. Goldsmith.* On September 12, 1896, judgment of foreclosure in the usual form was entered in the suit of B. K. Miller, trustee, against Bernard Goldsmith and wife, decreeing that the premises be sold to pay the claim of Miller amounting to $167,832, and that the defendants therein be barred of all their interest in the premises described in the complaint. On November 19, 1896, notice of *lis pendens* was filed in the mechanic's lien suit, and on November 20, 1896, Miller, trustee, was joined as a defendant. On June 12, 1897, judgment was entered in the mechanic's lien suit, by which it was determined that there was due the several lienholders, in the aggregate, the sum of $57,655.27, which sums were liens on the premises prior to all other claims and mortgages, and that said liens attached November 25, 1891, and the judgment provided that the premises be sold to satisfy the liens, and that on sale the rights and claims of all parties, including Bernard Goldsmith, the *Connecticut Mutual Life Insurance Company,* and B. K. Miller, trustee, be forever barred and foreclosed. On November 1, 1897, the premises were sold under the judgment entered in the foreclosure suit brought by Miller, trus-

tee, and bid in by Miller, and a conveyance made to him by the sheriff, which sale was duly confirmed. On June 25, 1900, the premises were sold under judgment in the suit for the foreclosure of mechanics' liens, and the premises purchased by the plaintiff, *Connecticut Mutual Life Insurance Company.*

In the present action, brought to foreclose the $190,000 mortgage executed to the plaintiff, the judgment entered determined that there was due the plaintiff the sum of $228,110.73; that the plaintiff's mortgage was not merged in the free title it had acquired under the sale in the mechanic's lien action, and that the inchoate dower interest of appellant *Alpha O. Goldsmith* still existed in the premises, but was subject to the plaintiff's mortgage, and should be barred by the foreclosure sale. The appellant *Alpha O. Goldsmith* appealed from the whole of this judgment, and the plaintiff appealed from that portion thereof decreeing that appellant *Alpha O. Goldsmith* had an inchoate dower in the premises.

For the plaintiff there was a brief by *Nath. Pereles & Sons,* attorneys, and *Turner, Hunter & Goff,* of counsel, and oral argument by *C. F. Hunter.*

For the defendant there were briefs by *Miller, Mack & Fairchild,* and oral argument by *W. D. Hickman* and *A. W. Fairchild.*

KERWIN, J. The controlling question upon both appeals in this case is whether the inchoate right of dower of the appellant *Alpha O. Goldsmith* was extinguished by the foreclosure in the mechanics' lien suit. It is claimed on the part of the plaintiff that it was, while on the part of the appellant *Alpha O. Goldsmith* it is insisted that the foreclosure and sale under the mechanics' liens, upon the undisputed facts, operated to revive in the appellant *Alpha O. Goldsmith* her inchoate dower interest which she had released in the mort-

gage to B. K. Miller, trustee, in which she joined with her husband. There is no claim here on the part of the plaintiff that the inchoate right of dower of the appellant *Alpha O. Goldsmith* could be cut off by a mere foreclosure of the mechanics' liens without a release in any manner of her right of dower. But the claim of plaintiff is that the interest of B. K. Miller, under his mortgage from defendant Bernard Goldsmith and wife, passed to the plaintiff under the foreclosure and sale in the mechanic's lien action. It appears from the statement of facts that B. K. Miller held a mortgage from Bernard Goldsmith and wife, *Alpha O. Goldsmith,* subequent to the mechanics' liens, and that this mortgage was foreclosed, and a judgment entered in favor of Miller barring and foreclosing all the right, title, and interest of Bernard Goldsmith and the appellant *Alpha O. Goldsmith* in the premises described in the mortgage. Subsequent to the entry of said judgment Miller was joined as defendant in the mechanic's lien action, and judgment was thereafter rendered in such action adjudging that the premises described in the complaint and all the right, title, and interest of the defendants, including the defendant B. K. Miller, or any, person claiming under them, be sold in accordance with the provisions of the statute for sale under foreclosure of mechanics' liens, and that all the defendants and all persons claiming under them, or either of them, be forever barred and foreclosed of all right, title, interest, and equity of redemption in the premises. Under this judgment the property was sold and purchased by plaintiff.

A very able and interesting argument is made by counsel for appellant *Alpha O. Goldsmith* to the point that the foreclosure of the mechanics' liens operated to revive the inchoate right of dower of *Mrs. Goldsmith,* and some stress is placed upon the fact that the plaintiff bid in the property at the mechanic's lien sale, and that the judgment in the mechanic's lien action was entered prior to the sale under the B. K. Mil-

ler mortgage, and that there was no privity between the plaintiff and B. K. Miller. But we think secs. 3321, 3324, 3326, Stats. (1898), establish the privity and are decisive of the question. Sec. 3324 provides that the interest of the owner of the premises at the time of the commencement of the work, or which "he or any person claiming under him has since acquired," shall be sold. B. K. Miller, through his judgment of foreclosure under his mortgage, acquired the interest of the defendant Bernard Goldsmith discharged of all inchoate right of dower of *Alpha O. Goldsmith,* and this interest under the statute was subject to the mechanics' liens, since it was an interest held by a person claiming under the defendant Bernard Goldsmith and acquired after the liens attached. The fact that Miller bought in under the sale on his foreclosure judgment subsequent to the judgment in the mechanic's lien action does not better *Alpha O. Goldsmith's* position, since whatever rights Miller got by his judgment or under it were subject to the rights of the mechanic's lien claimants. Miller, by the foreclosure and sale under his mortgage, acquired all the interest of Bernard Goldsmith and *Alpha O. Goldsmith,* and such interest passed under the sale in the mechanic's lien action to the plaintiff by force of secs. 3321, 3324, 3326, 3169, Stats. (1898). *Tallman v. Ely,* 6 Wis. 244. The argument of counsel for appellant *Alpha O. Goldsmith* seems to be that the title of Miller through the mechanic's lien action was defeated, that the mechanic's lien action was hostile to the claim of Miller under his mortgage, and that when his rights under the mortgage were barred the dower interest was revived. But we think this result by no means follows. We think the provisions of the statutes above referred to clearly mean that the purchaser under a mechanic's lien sale takes the interest acquired subsequently to the attaching of the liens by any person claiming under the owner of the premises subsequent to the doing of the work or the furnishing of the materials. The interest of Miller un-

der his mortgage was clearly one which accrued under Bernard Goldsmith since the mechanics' liens attached, and, therefore, under the statutes above referred to, was subject to the mechanics' liens.

Sec. 3321, Stats. (1898), respecting actions for the foreclosure of mechanics' liens, provides that all persons having liens upon the premises by mortgage, judgment, or otherwise subsequent to the lien sought to be foreclosed may be joined as parties defendant. Sec. 3324, respecting judgments in mechanic's lien actions, provides that the judgment shall direct that the interest of the owner of the premises at the time of the commencement of the work or furnishing the materials, "or which he or any person claiming under him has since acquired, . . . be sold to satisfy the amount of the lien of the plaintiff. . . ." Sec. 3326 provides how sales under such judgments shall be made, and that such sales shall be absolute and without redemption, and that the deed given thereon in case the sale is confirmed "shall be effectual to pass to the purchaser all the interest in the premises directed to be sold."

It appears that the judgment in the mechanic's lien action, and under which the plaintiff derived title, was in the usual form, and clearly embraced all the interest which Miller acquired under his mortgage foreclosure. Miller under the foreclosure of his mortgage acquired all the interest of the mortgagors in the premises. Sec. 3169 provides that such deed "shall vest in the purchaser all the right, title and interest of the mortgagor, his heirs, personal representatives and assigns in and to the premises sold and shall be a bar to all claim, right or equity of redemption therein, of and against the parties to such action, their heirs and personal representatives, and also against all persons claiming under them subsequent to the filing of the notice of the pendency of the action in which such judgment was rendered." We therefore see no escape from the conclusion that the inchoate dower in-

terest of appellant *Alpha O. Goldsmith* was extinguished and passed to Miller under his mortgage and was not revived by the mechanic's lien judgment, but passed to the purchaser under the mechanic's lien sale. Numerous other questions are discussed upon these appeals, but we do not consider them material from the view we take of the case. Since *Alpha O. Goldsmith,* appellant, has no inchoate dower interest in the premises, she is not prejudiced by the judgment. From what has been said it follows that the judgment must be affirmed on appeal of *Alpha O. Goldsmith* and reversed on plaintiff's appeal.

By the Court.—The judgment is reversed, and the cause remanded with instructions to enter judgment in conformity with this opinion; the plaintiff to recover costs.

LOGEMAN BROTHERS COMPANY, Respondent, vs. R. J. PREUSS COMPANY, Appellant.

February 21—March 19, 1907.

Sales: Implied warranty: Attachment to be connected to machine: Special verdict: Instructions to jury: Burden of proof: Setting aside verdict: Misconduct of jury: Evidence: Leading questions: Immaterial error.

1. There is no implied warranty of the practicability of connecting an addition or new attachment to a machine not manufactured or delivered by the maker of the attachment, where such practicability is a matter as apparent to the vendee as to said maker.
2. There is no implied warranty that the addition or attachment will answer the known purpose for which it was designed, where the capacity to do the work intended must be the joint capacity of the new device and the old machine.
3. There is no implied warranty that a machine or attachment will do the work for which it is intended, where it is made according to a model furnished for that purpose by the vendee.

4. A question for special verdict, "Did the plaintiff agree to manufacture and attach to defendant's punching press certain attachments which would enable the defendant, with the use of such press when equipped with such attachments, to perform the work required by the defendant?" is *held* to cover the controverted facts claimed to constitute an express warranty, so that a negative answer thereto negatived the existence of any such warranty.
5. An instruction to the jury that as to such question the burden of proof was upon the defendant was not misleading, the jury knowing the positions taken by the respective parties with reference to that question.
6. Instructions to the effect that burden of proof means the duty of proving a fact by the preponderance of evidence; that preponderance of evidence means the greater convincing power of evidence; that that side has furnished the preponderance of evidence which has produced evidence of greater convincing power in the minds of the jury than that produced by the other side; that the party upon whom rests the burden of proof does not lift that burden by merely producing a preponderance of the evidence; that the evidence produced by him, though of slightly greater convincing power than that of his opponent, may still be weak and leave the mind in doubt; and that in order to entitle a party to a finding in his favor his evidence must not only be of greater convincing power, but it must be such as to satisfy or convince the minds of the jury of the truth of his contention,—are *held* not erroneous as being self-contradictory, illogical, or misleading.
7. A verdict in a civil action should not be set aside because of improper conduct of jurors not occasioned by the prevailing party or any one in his behalf, where the court cannot see that it had or might have had an effect unfavorable to the losing party. So *held* as to a quarrel leading to blows between two jurors in the jury room, it not appearing that such quarrel had any tendency to coerce any juror to agree to the verdict.
8. A question asked by plaintiff's counsel of a witness for plaintiff: "Counsel [for defendant] has asked one or two questions . . . in which it was assumed that plaintiff undertook to manufacture those attachments and fit them to the machine so that the machine would perform, or be able to perform, the work in question. Was there such an undertaking on the part of the plaintiff?" is *held* objectionable as leading and calling for a conclusion; but as the subject of the question had been already gone over by both parties in detail and the question came as a final summing up on rebuttal, the error in allowing it is *held* not to have been prejudicial.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

The judgment appealed from was for $180 in favor of the plaintiff in an action on contract. The complaint sought recovery for work, labor, and materials, of the reasonable value and for the agreed price of $180, performed and furnished by respondent at request of the appellant. After a general denial the answer averred the making of a contract whereby the respondent undertook and agreed to construct and erect in working order a press for the use of the appellant, and guaranteed that the same would perform the work required by the appellant, and that the respondent was aware of the purpose for which the machine was to be used, but failed to so construct the machine that the latter was sufficient to perform the work required by the appellant. The evidence, however, established that the appellant had possession of an old press upon which it desired some punching and riveting attachments for the purpose of punching and riveting iron, that it furnished the respondent a sample or model of the riveting device to be attached, did not furnish any model of the punching device, and the whole order was given at once by one entire contract. The respondent was a manufacturer of machinery and knew the purpose for which the appellant required the attachments. Of the $180 compensation, the work and material on the riveting device would represent about $120 and on the punching device about $60. The devices were constructed and attached by the respondent. The punching device failed to work, not on account of any fault in the construction or material of the device itself, but by reason of the difficulty or impracticability of connecting it to and using it upon the old press. The strips of iron to be punched were of such length and such number of holes were required to be made by a single operation of the machine that the attachments for punching could not be placed so that the punching stroke was in a direct line with the application of the power.

Consequently the steel punches did not meet the dies squarely and broke in operation. So far the testimony is undisputed. There was, however, a considerable conflict of evidence with reference to whether or not the respondent, after having examined the press preparatory to making and connecting the attachments for riveting and punching, had represented that the press with those attachments could be used for appellant's purposes; that is to say, would do the work of punching and riveting as required by the appellant.

A special verdict was submitted to the jury and returned by them as follows:

"Did the plaintiff agree to manufacture and attach to defendant's punching press certain attachments which would enable the defendant with the use of such press when equipped by such attachments to perform the work required by the defendant? *A.* No."

No additional or different question was requested by appellant to be submitted to the jury. During the deliberations of the jury a quarrel arose in the jury room between two of the jurors, blows were struck, and after the jury had returned the above verdict the matter was brought to the attention of the court and one of the jurymen engaged in the quarrel was fined $10 and the other $20 for contempt of court.

Edgar L. Wood, attorney, and *A. C. Umbreit,* of counsel, for the appellant.

For the respondent there was a brief by *Kleist & Bender,* and oral argument by *W. H. Bender.*

TIMLIN, J. The appellant assigns as error that the verdict submitted fails to cover all the issues in the case which were for the jury. For the purpose of determining what questions should be submitted to a jury in cases where a special verdict is called for, we first consider the issues made by the pleadings, then how many or which of these issues have been eliminated by admissions on the trial, by uncontradicted evidence

concerning such issues, or by failure of proof on the part of that party upon whom the burden of proof rests. Without descending into the details of evidence, we then select issues of fact which remain for the jury. These will constitute the special verdict.

The single question submitted to the jury in the instant case covers all material controverted questions of fact which remained when the evidence for both parties closed. It did not use the words "express warranty," but it covers the controverted facts which were claimed by the defendant to constitute an express warranty in this case, and it is the better for this quality. As answered it is sufficient under the evidence in this case to which it applies to negative the existence of any express warranty. But the defendant contends that, notwithstanding this negation of express warranty, there was an implied warranty that the manufactured article was reasonably fit for the purposes for which it was known by the manufacturer thereof to have been intended, and that this legal conclusion follows from these facts, viz.: The defendant, a manufacturing corporation, desired a machine for punching and riveting steel strips about fifty-four inches in length, and for reasons of economy attempted to fit out an old press which it had with attachments for punching and riveting, and employed the plaintiff, a manufacturer, to do this work for $180. Before closing the contract the plaintiff was shown the old press so to be fitted up. It was apparent from the length of the steel strips to be punched, the number of holes to be made at one stroke, and the width of the old press that the punching attachments could not be so placed on the old press in connection with the riveting apparatus to be attached thereto that the punching stroke would be in a direct line with the application of the power which moved the stroke. A plan or model for the construction of the riveting device was furnished by the defendant to the plaintiff, but no plan or model for the construction of the punching attachment was fur-

nished. The riveting device constituted the principal part of the cost of manufacturing and attaching these two devices to the old press. The plaintiff in due time manufactured and attached to the old press both devices, but the punching device failed to work properly, not on account of any defects or imperfections of workmanship or material in the device itself, but because of the difficulty or impossibility of so connecting it with the old press that the punching stroke was in a direct line with the power applied to produce that stroke. Under such circumstances is there any warranty implied by law? Both parties rely on *Fisk v. Tank,* 12 Wis. 276, where it is said:

"In executory contracts for a specific purpose, especially by manufacturers, there is an implied warranty that the article delivered shall answer the purpose for which it was designed."

But the court held in that case that the defendants were entitled to prove, if they could, that it was the weakness of the boat or the negligence or the want of skill of the plaintiff or his agents, and not the defendants' defective or unskilful workmanship, which caused the unsuccessful operation of the machinery. In *McQuaid v. Ross,* 85 Wis. 492, speaking of the doctrine of implied warranty in general, it is said "to be founded on an actual or presumed knowledge by the vendor, as manufacturer, grower, or producer, of the qualities and fitness of the thing sold for the purpose for which it was intended." In *T. B. Scott L. Co. v. Hafner-Lothman Mfg. Co.* 91 Wis. 667, 65 N. W. 513, it is said:

"It is undoubtedly the rule, as contended for by defendant, that where manufactured articles are sold for a particular purpose, and the purchaser does not have an opportunity for inspection, but trusts to the judgment of the seller, there is an implied contract that such articles will come within the description of those contracted for, and be merchantable for the particular purpose intended. *Merriam v. Field,* 24 Wis. 640; Benj. Sales, § 657."

If the machine is manufactured under a contract according to a model furnished by the vendee, there is no implied warranty that it will do the work. *J. Thompson Mfg. Co. v. Gunderson,* 106 Wis. 449, 82 N. W. 299. When the article ordered is to be of a particular design or pattern well defined and understood between the parties, and the article made and delivered in pursuance of the contract conforms to the pattern or model, there is no warranty implied further than it should be of good workmanship and material. *Cosgrove v. Bennett,* 32 Minn. 371, 20 N. W. 359, as cited in *J. Thompson Mfg. Co. v. Gunderson, supra.* So, if a manufacturer or dealer contracts to sell a known or described thing, although he may know the purchaser intends it for a specific use, if he delivers the thing sold there is no implied warranty that it will answer or is suitable for the specific use to which the purchaser intends applying it. Id., citing *Gachet v. Warren,* 72 Ala. 288. To the same effect: *Milwaukee B. Co. v. Duncan,* 87 Wis. 120, 58 N. W. 232; *H. McCormick L. Co. v. Winans,* 126 Wis. 649, 105 N. W. 945; *La Crosse P. Co. v. Helgeson,* 127 Wis. 622, 106 N. W. 1094. In *Carleton v. Jenks,* 80 Fed. 937, 26 C. C. A. 265, the contract required a new boiler to be made and placed in a vessel. The place in the vessel in which the boiler should be placed and the opportunities and advantages for fastening the boiler therein were known to both parties, or at least as plainly observable to the one as to the other. The manufacturers of the boiler represented that the fastening of the boiler in the vessel would be sufficient. The court said on the question as to whether or not the purchaser was entitled to rely upon this as a material representation:

"We are unable, however, to find much force in this suggestion. It might have significance if the question related to the construction of the boiler itself, and applied to inherent defects, or those which were not as readily observable to the other party as to the manufacturers; but the matter of the fastenings to the boat was open and as much exposed to the inspection and judgment of the appellants as to the manu-

facturers, and the requirements would seem to be as much within the knowledge of the manager, the captain of the boat, and more especially the chief engineer, who had immediate charge of the machinery, as to any one."

After holding that the alleged misrepresentation was a mere expression of opinion upon, or confidence in, the mode or sufficiency of the fastenings, and not intended or understood to be in the nature of a contract, the court passes to the question of implied warranty, and disposes of that as follows:

"We have, as already stated, found that here there was no express warranty, and there can be no implied warranty, that the work and materials furnished were suitable and adapted to the purpose, in respect to the defect which it is claimed existed here, where it was open, and as plainly observable to the vendee as it was to any one. *Jones v. Just,* L. R. 3 Q. B. 197; *Kellogg B. Co. v. Hamilton,* 110 U. S. 108, 3 Sup. Ct. 537; *Dushane v. Benedict,* 120 U. S. 630, 636, 7 Sup. Ct. 696."

See, also, *Davis Calyx D. Co. v. Mallory,* 137 Fed. 332, 69 C. C. A. 662.

In the instant case the press upon which the attachments were to be made belonged to the purchaser, who was also a manufacturer. The purchaser must be presumed to have known the length of the iron strips which he required to have punched and the width and all dimensions of the press. The contract required two attachments, one for riveting and one for punching, to be put on this same press. The vendee furnished the manufacturer a model for the construction of the riveting attachment. The jury having negatived the claim of express warranty made by the purchaser, if we assume for argument's sake that the purchaser, being defendant, can then fall back on an implied warranty which he has not pleaded, we discover, first, that his motion *non obstante veredicto* was properly denied, because the implied warranty in any event would not cover the greater part of the contract, which related to the riveting device which was built according to the pur-

chaser's model; second, that the implied warranty would not cover the practicability of connecting the manufactured attachments to the defendant's old press, because that was a matter as apparent to the purchaser as it was to the manufacturer, and, there being no defect in the workmanship or material of the devices themselves either for punching or riveting, the fault lying altogether in their annexation to the old press, there could be no implied warranty in any event. An implied warranty does not arise merely because the seller or manufacturer is personally wiser, more learned, or more experienced than the purchaser. It is entirely impersonal. It assumes in the case of a manufactured article coming within the rule of implied warranty that the manufacturer has made it and sold it to do the work for which it was intended, in legal effect contracting that it shall do such work. This excludes all known experimental devices, all additions or annexations to another machine not manufactured or delivered by the seller where the capacity to do the work intended must be the joint capacity of the new device and the old machine. We accordingly find that there was no implied warranty shown in the case at bar.

It is argued that the court erred in charging the jury that, as to the question submitted, the burden of proof was upon the defendant. The question was interrogative in form: "Did the plaintiff agree," etc.? The court said: "The burden of proof as to this question is upon the defendant." The jury had already heard the version of the plaintiff and that of defendant. The instructions of a court to a jury must be construed with reference to the subject matter under discussion, like all other spoken or written language. The jury knew the position that defendant took upon that matter and with reference to that question. The jury also knew the position plaintiff took upon that matter and with reference to that question. The charge of the court in this particular was therefore clear to a jury of ordinary intelligence.

Criticism is made because in the instructions to the jury "burden of proof" is defined to mean the duty of proving a fact by the preponderance of evidence. "Preponderance of evidence" is then defined to mean the greater convincing power of evidence; but the definition does not stop there. It is further illustrated by saying that in the trial of a lawsuit that side has furnished the preponderance of evidence which has produced evidence of greater convincing power in the minds of the jury than that produced by the other side. These observations to the jury seem to be preliminary to the statement which follows, in these words:

"The party upon whom rests the burden of proof does not lift that burden by merely producing a preponderance of the evidence. He may produce a preponderance—that is, he may produce evidence of slightly greater convincing power to that given or produced by his opponent,—but still his evidence may be weak and leave the mind in doubt. In order to entitle a party to a finding in his favor, his evidence must not only be of greater convincing power, but it must be such as to satisfy or convince the minds of the jury of the truth of his contention."

To the appellant this instruction seems "self-contradictory, illogical, misleading, and therefore erroneous." These undesirable qualities are found by appellant because the jury

"were told that the burden as to this question was upon the defendant, and that such burden meant the proving of whatever fact the question submitted for determination, by the preponderance of the evidence, and that a preponderance of the evidence meant the greater convincing power. Yet in that immediate connection they were told that a party might meet this burden of proof by producing evidence of a greater convincing power than that produced by his opponent and yet not lift this burden, because, although the evidence was convincing, nevertheless it might be weak and leave the mind in doubt. We cannot conceive how convincing evidence or evidence of convincing power could be weak and leave the mind in doubt."

See, however, *Anderson v. Chicago B. Co.* 127 Wis. 273, 280, 106 N. W. 1077. If there is any conflict between the views of appellant's counsel and those expressed in the case last cited, manifestly the latter should govern.

The matter of the misconduct of the jury seems to have been handled by the learned circuit judge with skill and propriety. After the jury had returned their verdict in this case, the quarrel in the jury room was made a subject of investigation by the court before the discharge of the jury, and two of the jurors were found guilty of contempt of court for striking one another in the jury room during the deliberations on their verdict in this case, but thereafter all the jurors agreed to this verdict, and there was no claim made by the jurymen that the agreement of either was the result of coercion. Counsel now argue that because the disagreement which gave rise to the offensive language, which in turn caused the blows, arose in the discussion of this case, the blows and violence necessarily affected the verdict by coercing one or the other of the parties engaged. But this overlooks the fact that no such claim was made by either of the jurymen, no dissent from the verdict expressed, and that the human frailty of anger may, and often does, arise from slight and unimportant causes on account of some side remark having little or no bearing upon the subject under discussion, or from some personal or offensive allusion. The mere fact that there was a quarrel in the jury room and that the quarrel reached that degree of violence which brought the parties to blows, while undoubtedly misconduct, is not necessarily misconduct affecting the verdict. The circuit judge, after he had punished the recalcitrant jurors, denied a motion to set aside this verdict and for a new trial based on this ground. His opportunities for determining whether or not the quarrel affected the verdict were most excellent. We cannot say that he erred in this decision, or that the transactions in the jury room naturally tended to coerce or threaten any member of the

jury into agreement with any other or all other members. *Brown v. State,* 127 Wis. 193, 106 N. W. 536, presents a different question. In the instant case there is a lack of connection between the quarrel and its effects and the matter of coercing the jurors into an agreement on the verdict. The rule sustained by the weight of authority and the better reason seems to be that laid down in *Jackson v. Smith,* 21 Wis. 26, to the effect "that in civil cases, if such improper conduct does not appear to have been occasioned by the prevailing party or any one in his behalf, and the court cannot see that it had or might have an effect unfavorable to the party moving for a new trial, the verdict ought not to be set aside." See, also, *Carter v. Ford P. G. Co.* 85 Ind. 180; *Koehler v. Cleary,* 23 Minn. 325; *Clark v. Lebanon,* 63 Me. 393; *Crane v. Sayre,* 6 N. J. Law, 110.

After the plaintiff had produced its evidence in chief and rested, and the defendant had produced evidence in support of the affirmative defenses in its answer and rested, and after the plaintiff had produced its evidence in rebuttal of the last-mentioned affirmative defenses, and the last witness for the plaintiff had been cross-examined, upon redirect examination of such witness by counsel for the plaintiff the following question was asked:

"Counsel [referring to counsel for defendant] has asked one or two questions here, Mr. Logeman, in which it was assumed that the plaintiff undertook to manufacture these attachments and fit them to the machine so that the machine would perform, or be able to perform, the work in question. Was there such an undertaking on the part of the plaintiff?"

This was objected to as leading and calling for a conclusion, and the objection was overruled and proper exception taken, and the witness answered, "It was not." We cannot approve of this ruling, and, were it not that the subject of the question had been already gone over by both parties in detail and this was a final summing up on rebuttal, the judgment would have

to be reversed—not that this form of question is proper in re-examination or rebuttal, but coming at that stage of the trial, and being but a summary of matters theretofore testified to in detail, the court is not convinced that the ruling was prejudicial to the appellant.

By the Court.—The judgment of the circuit court is affirmed.

SULLIVAN, Appellant, vs. COMPRESSED AIR RENOVATOR AND SWEEPER MANUFACTURING COMPANY, Respondent.

February 21—March 19, 1907.

Patents: Annulment of license.

In an action to revoke and annul a license by which plaintiff gave to the defendant corporation the exclusive right to make and sell a patented device, the facts (showing, among other things, that, although defendant had not been successful in making and selling the machines covered by the invention, yet it had acted with reasonable diligence and had complied in all respects with the terms of the license agreement) are *held* not to entitle plaintiff to any relief.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

This is an action to revoke, set aside, and annul a certain license issued to the defendant by the plaintiff and one John H. Stouthamer October 19, 1905, for making, using, and selling pneumatic renovators.

It appears from the record, and is undisputed or found by the court, in effect: (1) That prior to November 25, 1904, said device had been invented by the plaintiff and one George J. Harris, and on that day they filed an application for a patent therefor, which application is still pending. Subsequently, and prior to the issue of said license, said Harris had sold all his right, title, and interest in said invention to said

Stouthamer, who held a recorded assignment thereof from Harris. October 19, 1905, the defendant company became incorporated under the laws of this state with a capital stock of $50,000, divided into 500 shares of $100 each, subscribed for as follows: the plaintiff $23,500, Stouthamer $23,500, Dietz $1,000, Schultz $1,000, De Swarte $1,000, which parties were all made directors, and Dietz was elected president, De Swarte vice-president, the plaintiff secretary, and Stouthamer treasurer. (2) The defendant accepted all of said stock subscriptions and called them all in and made them payable. Said license gave to the defendant the exclusive right to make and use said device until the issuance of the patent, and then during the life of the patent. (3) The consideration for granting said license was $10,000 of fully-paid stock issued to the plaintiff and a like amount issued to Stouthamer, and a royalty of five per cent. of the selling price of each machine. (4) The plaintiff and Stouthamer each turned back or attempted to turn back into the treasury of the defendant the balance of the stock so subscribed by him—that is to say, $13,500 each,—making an aggregate amount of $27,000, for which no consideration has ever been paid by either of them, but the defendant has taken no action thereon. (5) Of the stock so turned back the defendant has, by and with the consent of the plaintiff and Stouthamer, re-issued twelve shares to Dietz, who has paid therefor to the defendant $600 and no more, and ten shares to Keppel, who has paid therefor $550 and no more, and five shares par value to George Harris for services at par. (6) Since the incorporation of the defendant, Dietz has paid to the defendant to apply on his stock subscriptions $1,490, Stouthamer has paid to the defendant about $100, and Schultz has paid in $50. (7) The plaintiff has contributed no further sum than mentioned to the corporation. (8) Immediately after the organization of the defendant it commenced the manufacture of renovators embodying said invention. (9) From the organization of the defendant to

within a few days prior to the commencement of the action the business has been conducted under the joint management of the plaintiff and Stouthamer, and the same was conducted harmoniously at all of said times. (10) All the business of said corporation was done with the consent and approval of the plaintiff, and without objection or dissent by him until the commencement of this action. (11) By general understanding of all persons interested, but without corporate action, the defendant was to issue 100 shares of its stock so subscribed by the plaintiff and Stouthamer, besides the 100 shares which were issued to the plaintiff and Stouthamer as mentioned, but only fifty-seven shares thereof were taken as aforesaid. (12) The defendant through its said management found it best at the outset to change the construction and manner of operating said device, and much time and money have been consumed in making such changes, to all of which the plaintiff consented and advised and co-operated therein. (13) In consideration of the amount of the capital stock employed, the best results obtainable had been attained at the time this action was commenced. (14) The defendant has rendered the statements required by said license to be made to the licensors and has paid all royalties due on said license. (15) The defendant has acted with reasonable diligence under all circumstances attending the business, and has complied with the terms of said license agreement in all respects. (16) The charge of the complaint that the other members of the defendant or any of them have conspired against the plaintiff for any purpose whatever is not proven. (17) The charge in the complaint that some of the stockholders have agreed among themselves to limit the output of the corporation is not proven, and none of said stockholders have endeavored to compel the plaintiff to part with his interest in the corporation, and it is not true that the business of the defendant is to be conducted so as to deprive the plaintiff of any revenue from the sale and manufacture of said renovators.

(18) No resolution or motion was ever offered or made by the plaintiff in any corporate meeting to provide for the issue of any more of said stock, and no action has ever been taken to issue any more of said stock. (19) All parties have assumed that such unissued stock could be issued for an amount less than par. All stockholders have made numerous efforts to sell or dispose of some of said unissued stock at prices ranging from 50 to 100 per cent. par value, but none of said efforts have been successful, except as hereinbefore stated. The plaintiff has had the consent and co-operation of all the members and officers of the defendant to dispose of the balance of said 100 shares which was agreed among the members to be issued, but no unconditional offer has been received for the same or any part thereof, and no offer therefor, or for any part thereof, at par has been obtained. The canceling or annulling of said license would render the investments of stockholders other than the plaintiff valueless, and would destroy the business of the defendant.

As conclusions of law the court found, in effect, (1) that the license agreement has not been violated by the defendant; (2) that the plaintiff is not entitled to any of the relief demanded or prayed for in the complaint; (3) that the prayer of the complaint be denied on the merits, and the complaint dismissed, with costs and disbursements to be taxed in favor of the defendant and against the plaintiff; and judgment was ordered accordingly.

From the judgment so entered the plaintiff appeals.

For the appellant there was a brief by *Charles H. Hamilton* and *Fred A. Teall,* and oral argument by *Mr. Teall.* They contended, *inter alia,* that where, as here, the plaintiff has given an irrevocable license to the defendant for which he has received practically no consideration and whereby he is deprived of the right to manufacture his invention, and the defendant refuses or fails to manufacture it, and where that contract was doubtless induced by the confidential relations

existing between the plaintiff and Mr. Stouthamer, who is now the principal stockholder and virtually in control and management of the company, such a contract is virtually in restraint of trade and is unconscionable and without consideration.

Lyman G. Wheeler, for the respondent.

CASSODAY, C. J. The findings of the court as set forth in the foregoing statement are amply sustained by the evidence. The facts so established make it very clear that the plaintiff is not entitled to any relief in this action. It is quite obvious that the failure to successfully manufacture and sell the machines covered by the invention was owing to a want of cash capital. In fact, the plaintiff testified to the effect that to make a success out of the business required $10,000 or $15,000 of cash capital. Of course, this could not be supplied by issuing paid-up or partially paid-up capital stock to the owners of the invention as consideration therefor. The method of raising the requisite cash capital is, of course, a matter of business policy and administration.

By the Court.—The judgment of the circuit court is affirmed.

STATE EX REL. HAESELICH, Respondent, vs. SCHWEITZER, Appellant.

February 21—March 19, 1907.

Justices' courts: Jurisdiction: General appearance: Docket entries: Waiting for appearance: Adjournments: Certiorari.

1. A statement in a justice's docket that at the return hour of process all parties were present "in court" is equivalent to a statement that all parties appeared.
2. A general appearance is a waiver of defects in the form or service of process.

3. A justice is not required, under sec. 3623, Stats. (1898), to wait one hour for the appearance of the parties if they appear sooner.
4. An adjournment within the discretionary power of a justice under sec. 3365, Stats. (1898), does not deprive him of jurisdiction merely because made on plaintiff's motion.
5. Jurisdictional defects not set forth in the petition for a writ of *certiorari* will not be considered on such writ.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Churchill, Bennett & Churchill,* and oral argument by *W. H. Churchill.*

For the respondent the cause was submitted on the brief of *Zebulon Pheatt.*

WINSLOW, J. The appellant, *Schweitzer,* commenced an action for unlawful detainer against the relator, *Haeselich,* before a justice of the peace, and obtained judgment of restitution of the premises, with costs and $10 for rent due. Thereupon *Haeselich* sued out a writ of *certiorari,* to which return was duly made, and after trial thereon the circuit court reversed the justice's judgment, and *Schweitzer* appealed.

Three alleged jurisdictional defects were specified in the petition, and these will be briefly considered.

1. It appears that the summons issued was not in the form prescribed by sec. 3362, Stats. (1898). However, it further appears from the docket of the justice before whom the action was commenced that on the return day of the summons at the hour named therein all parties were present "in court." This is equivalent to a statement that all parties appeared. *Brandies v. Robinson,* 45 Wis. 464. A general appearance is a waiver of defects in the form or service of process. *Lowe v. Stringham,* 14 Wis. 222; *Fulton v. State ex rel. Meiners,* 103 Wis. 238, 79 N. W. 234.

2. It is objected that the justice before whom the action

was commenced did not wait one hour after calling the case for the appearance of the parties, as required by sec. 3623, Stats. (1898), but immediately transmitted the case to the next nearest justice on account of kinship to the appellant. There are at least two sufficient answers to this objection, viz.: (1) The docket shows that the case was called at 9 o'clock a. m., which was the hour named in the summons, and that the papers were not transmitted until 10:01 o'clock a. m.; (2) the justice was not required to wait an hour in case the parties sooner appeared. Sec. 3623, *supra; Brandies v. Robinson, supra.*

3. The relator did not appear before the justice to whom the case was transferred, and that justice, after receiving the papers, adjourned the case on plaintiff's motion for three days. Sec. 3365, Stats. (1898), specifically provides that the justice may, "in his discretion," adjourn the trial of the action, but not beyond six days after the return day of the summons. The fact that the plaintiff moved for such adjournment did not deprive the justice of his discretionary power. Therefore the record shows no loss of jurisdiction by the adjournment.

We have been referred to no statute authorizing the justice to render judgment for unpaid rent in such an action, but as this matter was not set forth in the petition for the writ as a jurisdictional defect it is not to be considered. *Tourville v. S. D. Seavey Co.* 124 Wis. 56, 102 N. W. 352.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment affirming the judgment of the justice.

GOLL, Appellant, vs. FEHR and another, Respondents.

February 21—March 19, 1907.

Promissory notes: Extension of time: Consideration: Mortgage of wife's separate estate to secure husband's debt.

1. **A note executed by husband and wife as collateral to a prior note of the husband, in consideration of a definite extension of the time for payment of such prior note, is valid as against the husband.**
2. **A mortgage of her separate property given by a married woman to secure payment of her husband's obligation is valid and enforceable in equity, and, no liability at law on her part being involved, the statute of frauds relating to the promise of one person to answer for the debt of another and the law respecting a wife's incapacity to incur a legal liability as surety for her husband have no application.**

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action to set aside a mortgage. The issues made by the pleadings may be readily seen by the following statement of the court's conclusions as to facts:

1. April 28, 1905, Ernst W. Goll, husband of the plaintiff, was indebted to the defendant bank in the sum of $3,000 and interest upon his promissory note of March 15, 1905, payable June 13, 1905, signed by him in his trade name of Sundell & Goll, and indorsed for his accommodation by Henry G. Goll.

2. About April 27, 1905, said bank notified Ernst W. Goll that by reason of the indorsement of Henry G. Goll not being of any value it would insist upon payment of the note at maturity, unless satisfactory security was immediately given in place of the indorser.

3. April 28, 1905, said Ernst W. Goll appeared at said bank with his wife and the latter then agreed and did, for the consideration hereinafter named, execute a note for $3,000 with her husband, dated on said day, payable to the order of

defendant *Fehr* one year after its date, and secured payment thereof by a mortgage upon her property mentioned in the complaint, the said note and mortgage being delivered to said *Fehr* and subsequently on said day duly assigned to said bank, which now owns the same.

4. At the time of the transaction last aforesaid it was agreed between the plaintiff, said Ernst W. Goll, the defendant *Fehr,* and said bank that upon maturity of the first-mentioned note payment thereof should not be demanded, but that it should be extended for one year after April 28, 1905, and that the second-mentioned note and mortgage securing the same should stand as security for the indebtedness to the bank instead of the note indorsed by said Henry G. Goll.

5. For the purpose of conforming to a custom of national banks not to make paper of a primary debtor payable at longer intervals than ninety days, said Ernst W. Goll in his aforesaid trade name about June 13, 1905, September 11, 1905, and again December 10, 1905, delivered to the defendant bank a memorandum note for $3,000, each being a renewal of the preceding one, the last of which notes is still held by said bank. Payment of none of said memorandum notes was demanded or received, it being understood that neither of them should constitute a substitute for the note and mortgage of April 28, 1905, nor constitute an extension of the time for payment of the indebtedness to said bank beyond the one year agreed upon.

6. January 18, 1906, said Ernst W. Goll was duly adjudged a bankrupt.

7. Said note of March 15, 1905, was not upon its maturity presented for payment, nor has payment thereof been demanded or made.

8. The said note and mortgage of April 28, 1905, were made to *Fehr* and assigned by him to the defendant bank for a good and adequate consideration, plaintiff fully knowing the purpose thereof and consenting thereto.

Upon such facts the court concluded that the mortgage of April 28, 1905, was valid and constituted a lien upon the lands described in the complaint, but that the defendant bank, upon a foreclosure of the mortgage, would not be entitled, in any event, to any deficiency judgment against appellant. Judgment was rendered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Dorr, Gregory & Stiglbauer,* attorneys, and *Adolph Huebschmann,* of counsel, and oral argument by *Mr. Huebschmann.*

For the respondents there was a brief by *W. H. Austin* and *G. G. Gehrz,* and oral argument by *Mr. Gehrz.*

MARSHALL, J. Some exceptions were taken to the findings of fact and are presented for consideration. Such findings have been tested by the evidence, resulting in our being unable to hold that they are against the clear preponderance of such evidence and, therefore, they must stand as verities in the case.

No reason is perceived why it was not competent for appellant's husband to make a note, valid as to him, to *Fehr,* acting for the bank, payable in one year after its date, the same to be turned over to the bank as collateral to Ernst W. Goll's note held by the bank, in consideration of payment of the indebtedness evidenced by such last mentioned note being extended till the due date of the collateral note. So we must hold that the note in form secured by the mortgage sought to be set aside was binding on appellant's husband. In *Fanning v. Murphy,* 126 Wis. 538, 105 N. W. 1056, this subject was discussed at some length, it being held that an accepted promise to extend the time of payment of a note for a definite period for a new consideration makes a valid contract. Here there was the promised extension, the definite time, and the new consideration, to wit, the giving of the collateral note, secured on appellant's property. So regarding it as estab-

lished, as we must, that the collateral note was binding on appellant's husband we pass to the subject mainly argued by appellant's counsel.

Counsel for appellant contend, in the main, that the appeal is ruled by the law respecting the promise of one person to answer for the debt, default, or miscarriage of another. The requisites of such a promise in order to be binding under the statute of frauds, and whether they were all satisfied as to the transaction in question, are discussed in counsel's brief, as they were upon the oral argument, with much learning, but it is the opinion of the court that the questions so presented are not necessarily involved in that of whether the judgment appealed from is right or not. This is not a case involving whether appellant is liable at law for her husband's debts, either as surety or as an original promisor, or otherwise liable at law. So the cases cited in that regard need not be considered.

The trial court went no further than to decide that the mortgage in question was a valid claim upon appellant's real estate to secure the obligation of her husband. The decision that upon a foreclosure of the mortgage no deficiency judgment, in any event, could properly be rendered against appellant, in effect decided that she was not personally liable for the indebtedness or obligation secured by the mortgage, but that the latter was valid under the law that, while a married woman cannot bind herself at law as surety for the payment of her husband's debt under her power to contract, she may bind her property in equity for payment thereof. The distinction between a married woman binding herself at law and charging her separate property in equity has been pointed out in many instances. *Reinig v. Hecht,* 58 Wis. 212, 16 N. W. 548; *Gaynor v. Blewett,* 86 Wis. 399, 57 N. W. 44; *Ritter v. Bruss,* 116 Wis. 55, 92 N. W. 361. She may do the latter by merely giving a mortgage on her property for no other purpose than to secure her husband's obligation, no consideration moving

directly to her in respect to the matter. A consideration moving to the husband, sufficient to support his obligation, will support her mortgage to secure performance of such obligation, so that equity will enforce it. That has long been the doctrine of this court and of others under similar conditions.

In *Loizeaux v. Fremder,* 123 Wis. 193, 101 N. W. 423, the wife signed the note with her husband, no consideration moving to her in the transaction, nor did the note concern her separate property or business. While it was held that she was not liable on the note, her mortgage to secure payment thereof was held valid, the court saying:

"While, of course, under her statutory power to contract with reference to her separate estate, she could make a perfectly valid mortgage thereon to secure this or any other debt, she could not bind herself to a legal liability by the mere promise to pay."

In the recent case of *Merrell v. Purdy,* 129 Wis. 331, 109 N. W. 82, the court, speaking by Mr. Justice WINSLOW, stated this as one of several principles respecting the contracting rights of married women that have become firmly settled by the adjudications in this court:

"A married woman may by proper instrument charge her separate property for any obligation, even for her husband's debt, but this charge is only enforceable in equity." Citing *Mueller v. Wiese,* 95 Wis. 381, 70 N. W. 485; *Hollister v. Bell,* 107 Wis. 198, 83 N. W. 297; *Loizeaux v. Fremder,* 123 Wis. 193, 101 N. W. 423.

In view of the foregoing it seems that little more need be said in deciding this case. Counsel for respondent, in addition to their argument in answer to that of counsel for appellant as to the effect of the statute of frauds upon the transaction in question, contend that the making of the mortgage was within appellant's power to charge her property in equity, citing most of the cases we have referred to. We are unable to perceive any answer to such contention. The matter does

not seem to be open to consideration in view of the statements made of established principles in *Merrell v. Purdy, supra,* to which we have referred.

So the case comes down to this: A married woman is under no disability cognizable in equity in respect to charging her separate property by a mortgage for the payment of the obligation of her husband, and the law respecting her want of capacity to incur a legal liability as surety for her husband or any other person is not inconsistent therewith. She may deal with her separate property as she sees fit under her statutory power respecting the matter. As has been said:

"A married woman may make a present charge upon or conveyance of her separate property as security for or in payment of her husband's debt, which will be valid and enforceable as against the property. Having the absolute power to dispose of the whole of such property if she chooses, and as she chooses, she may dispose of a part thereof. *Heath v. Van Cott,* 9 Wis. 516." *Fitzgerald v. Dunn,* 112 Wis. 37, 87 N. W. 803.

That the execution of a mortgage, as in this case, constitutes such a charge upon or disposition of property was expressly held here as early as the decision of the first case just referred to, and the rule thus established has not been departed from.

By the Court.—The judgment of the circuit court is affirmed.

SEXTON and another, Respondents, vs. GOODRICH, Appellant.

February 21—March 19, 1907.

Appeal: Review of evidence: Real-estate brokers: Commissions: Procuring cause of sale.

1. The supreme court will reverse a judgment based upon the verdict of a jury only when such verdict is wholly unsupported by credible evidence or when some error of law has been committed.

2. A broker cannot be said to be the procuring cause of a sale of real estate merely because he invites to it the attention of another who is already in active negotiation for its purchase, nor because he mentions to the owner as a possible purchaser one with whom the owner is already treating, when the final purchase results from a continuation of such pre-existing negotiations unaffected by the broker's act.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Modified and affirmed.*

Action for agreed two per cent. commission for effecting sale of two parcels of land by the plaintiffs at the employment of the defendant, one known as the Twenty-fourth street property and the other as the Grand avenue property. The defenses were, first, as to both parcels, that defendant acted only as agent for the respective owners in employing plaintiffs and did not become liable; and, as to the Twenty-fourth street property, a further defense that plaintiffs had agreed to accept in full payment of their commission all they could obtain above $1,000 for a certain other lot received in trade for the property sold. As to the Grand avenue property, a further defense was denial that plaintiffs sold or procured the sale of the property.

A special verdict was taken finding that the Twenty-fourth street property belonged to Nellie A. Goodrich, wife of defendant, and the Grand avenue property to Julia A. Teesdale, a relative of his; that defendant did not act and contract with the plaintiffs openly as the agent of either of said owners, nor did the plaintiffs know when they executed employment that the property was owned otherwise than by defendant. They also found, as to the Twenty-fourth street property, that no agreement had been made to accept in satisfaction of their commissions all that they might realize over $1,000 for another lot; and, as to the Grand avenue property, they found that the sale to Uihlein Bros. was effected through the efforts of the plaintiffs, and that the amounts of their commissions

so earned were, respectively, $110 for the Twenty-fourth street property and $900 for the Grand avenue property.

Defendant moved that the verdict be set aside and a new trial granted, for the reason that the answers to each of the disputed questions were "contrary to the preponderance of the evidence," which motion was overruled and judgment entered in favor of the plaintiffs upon the verdict, from which defendant appeals.

Charles D. Mann, for the appellant.

For the respondents there was a brief by *Stover & Stover,* and oral argument by *Paul Stover.*

DODGE, J. The single assignment of error is the overruling of defendant's motion to set aside a verdict and grant a new trial because the answers are against the preponderance of the evidence. This discloses an unaccountable confusion in counsel as to the questions which will be considered in this court on appeal. If there is no fault with the verdict other than that the preponderance of the evidence has been ignored by the jury, and the trial court, upon motion for that purpose, has refused to disturb it, it is futile to bring the case here on appeal. This court will reverse a judgment based upon the verdict of a jury only when such verdict is wholly unsupported by credible evidence or when some error of law has been committed. This policy has been declared so often that it ought not to be necessary to reiterate it. *Peat v. C., M. & St. P. R. Co.* 128 Wis. 86, 107 N. W. 355; *Bazelon v. Lyon,* 128 Wis. 337, 107 N. W. 337.

Counsel, however, did contend, at least upon the oral argument, that the findings of the jury had not even the support of any credible evidence and were opposed to uncontradicted evidence. We have therefore gone at large into the evidence, and find that, with one exception, the answers in the special verdict have the support of at least some evidence which, after approval of the verdict by the trial court, we can-

not say is incredible. The one exception is the answer to the eleventh question: "Was the sale to August Uihlein *et al.* of the property known as 619 Grand avenue, aforesaid, effected through the efforts of the plaintiffs? *Answer:* Yes." The testimony upon which this answer must have rested is brief and, in the main, without dispute as to specific facts. Wherever there is conflict we, of course, accept the testimony of the plaintiff *Frey* himself. He states that some time in September *Mr. Goodrich* first spoke to him about the Grand avenue property, and it was then listed on his book at a price of $52,000, commission two per cent. The terms of this contract were, in effect, as he states, as follows:

"I was to sell this property for $52,000, with two per cent. commissions. Nothing was said about the commission I was to get if there was less offered than $52,000. I telephoned in the evening to Mr. Henry Uihlein, and he told me to telephone to Joseph Uihlein. I telephoned to Joseph, and he said the price was too high and they would not consider it. *Mr. Goodrich* came in a few days later and I told him what they said, and he said, 'Are you sure they want it?' And I said, 'I think they will buy it if the price is right.' Some two weeks later I said he would have to reduce the price, and finally I said he would have to go and see the brewery personally."

Some time later, he says, he learned that it had been sold to the Uihleins for $45,000. At another place he states that Joseph Uihlein's response was that the price was too high, but if the price was right he would consider the purchase of it; further, that he never spoke again to any of the Uihleins in regard to it. On the other hand, it appeared, without dispute, that for more than thirty days prior to the employment of the plaintiffs one Dixon, in association with another real-estate firm, had had the property in hand for sale, and at that time was in active negotiation with Mr. August Uihlein, who had charge of all the real-estate business of his firm. He testified that the property was originally offered to him by Mr.

Dixon, who afterwards brought *Mr. Goodrich* to him, and that, after negotiation, a price was agreed upon and the deal consummated; that he did not know Sexton & Frey in any way, shape, or manner in the deal; that Joseph Uihlein's only contact with the business was in consummating the deal and bringing the papers into shape. Joseph Uihlein testified that, after the deal was negotiated, he was brought into contact with the matter substantially as August Uihlein had testified; that while the negotiations were on with Dixon he had a telephone from *Frey;* that, because of the negotiations with Dixon, he told *Frey* the price was too high, simply to say something so as not to have further negotiation with him.

"Mr. August Uihlein dealt with Dixon and *Goodrich.* I only came in on the evening when *Goodrich* came up to our office. That telephone is all I have had to do with *Mr. Frey.* The negotiations with Dixon had gone on for a considerable time previous."

Mr. Dixon gives a somewhat detailed statement of his negotiations with Mr. August Uihlein preceding the interview between defendant and plaintiff *Frey.* His visits with Uihlein were weekly and his interviews with *Goodrich* frequent; *Goodrich* demanding $50,000 and the Uihleins declining to pay so much or to name a price. Whereupon Dixon advised *Goodrich* to go and see Uihlein, which he did, and, as is undisputed, after some negotiation, agreed on a price of $45,000, and telephoned to Mr. Dixon's firm, who closed the trade, which was finally consummated some time the last of January, 1904.

We are forced to the conclusion that this evidence shows beyond dispute, and beyond any reasonable construction or inference to the contrary, that the sale of the property was due entirely to the negotiations of Mr. Dixon with Mr. Uihlein and the interviews between the latter and *Goodrich* brought about by Mr. Dixon, and that the simple act of the plaintiff *Frey* in telephoning to Uihlein that the price of the property

was $52,000 and asking him if he wanted it had no effect whatever in leading to or inducing the sale. A broker cannot be said to be the procuring cause of a sale of real estate merely because he invites to it the attention of another who is already in active negotiation for its purchase, nor because he mentions to the owner as a possible purchaser one with whom the former is already treating, and when, as here, the final purchase results from a continution of such pre-existing negotiations unaffected by the broker's act. *Francis v. Eddy,* 49 Minn. 447, 52 N. W. 42; *Wylie v. Marine Nat. Bank,* 61 N. Y. 415; *Ward v. Fletcher,* 124 Mass. 224; *Brown v. Shelton* (Tex. Civ. App.) 23 S. W. 483; *Burdon v. Briquelet,* 125 Wis. 341, 104 N. W. 83; *Burd v. Webster,* 128 Wis. 118, 121, 107 N. W. 23.

The result of these conclusions is that the recovery of the $110 as commissions upon the sale of the Twenty-fourth street property cannot be disturbed, but that, upon the evidence adduced upon the trial, the plaintiffs are not entitled to recover the $900 awarded them in the judgment as commissions upon the sale of the Grand avenue property. The latter issue seems to have been fully and completely tried, upon full testimony from all parties to the transaction, and no reason is apparent why the rights of the parties should not be finally declared as a result of such trial, instead of subjecting them to a new trial which must, beyond reasonable doubt, eventually bring them to the same result. Such is now the policy of this court declared by Rule 58.

By the Court.—The judgment is modified by reducing the damages therein to $110 as of the date of the judgment, and as so modified is affirmed; appellant to recover costs in this court.

BAUTZ, Appellant, vs. ADAMS and others, Respondents.

February 22—March 19, 1907.

(1-5) *Mortgages: Unrecorded assignment: Payment to and discharge by record owner: Possession of securities: Agency to receive payment: Evidence.* (6-8) *Appeal: Presumption against error: Construction of ambiguous finding: Facts not found.*

1. A person who deals with land by taking a mortgage or deed thereof is protected by the recording act as to a prior mortgage on the property which has been improperly discharged by the record owner, but not the real owner, of the security, such person not having notice of the assignment of such prior mortgage.
2. A debtor upon commercial paper whose obligation is secured by a mortgage on real estate owned by him is not protected by the recording act in paying the mortgage indebtedness to the record, but not the real, owner of the mortgage and taking a release thereof, such record owner not having possession of the security nor actual authority from the real owner to act as the latter's agent in the transaction.
3. Agency to receive payment of money due upon commercial paper secured by mortgage or otherwise can only be implied from possession, by the one assuming to have authority in the matter, of the securities and capacity to deliver the same upon payment being made.
4. Actual authority of a person, not the owner or possessor of a note and mortgage, to receive payment of the indebtedness is essential, in order for such payment to extinguish the security.
5. The actual authority above mentioned need not be expressed in writing or established by direct evidence. It may be established by circumstances showing with reasonable certainty its existence.
6. On appeal, in testing the sufficiency of a record to support a judgment, as a rule, the presumptions are against error, and such only are to be considered as appear with reasonable clearness.
7. If a finding by a trial court which is vital to a judgment is ambiguous, that one of two reasonable probable meanings which will support, is to be preferred over one that will defeat, it.
8. If a fact, essential to a judgment rendered in an equity case, does not appear to have been found by the trial court, but it appears from the record with reasonable certainty to exist, it may be found on appeal and judgment be rendered or directed accordingly.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action to foreclose a mortgage. An answer was interposed pleading, among other things, payment of the mortgage indebtedness and discharge of the mortgage. The issues of fact were thus decided:

(1) December 5, 1891, *Mary M. Adams* gave Wilhelm Woldt her promissory note for $1,350, due in four years, with interest at the rate of six and one-half per cent. per annum, payable semi-annually, securing payment thereon by the mortgage mentioned in the complaint. (2) At the time of the aforesaid transaction one C. W. Milbrath by a power of attorney duly recorded was the attorney in fact for said Wilhelm Woldt. (3) January 17, 1892, by virtue of such power of attorney said Milbrath, by an instrument duly executed and recorded, assigned said mortgage and note for value to the plaintiff, who continued in possession thereof up to the date of the trial. (4) The assignment was not recorded until the 30th day of August, 1905. (5) April 2, 1892, the mortgagor conveyed the mortgaged premises to said Milbrath, the conveyance being duly recorded April 15, 1892. May 5, 1904, said Milbrath conveyed said premises to one Gustav C. Mueller, the deed being duly recorded June 3, 1904. March 4, 1905, said Mueller conveyed the premises to George M. Hinkley by warranty deed, which was duly recorded March 13, 1905. (6) Said Hinkley purchased the premises subject to said mortgage and note December 5, 1905, and was furnished with an abstract showing such mortgage to be outstanding in the name of Wilhelm Woldt. He was informed that said Milbrath, acting under the aforesaid power of attorney, had full power to receive payment of the principal of and interest on said note and to satisfy and discharge the mortgage. (7) April 6, 1905, said Hinkley paid said Milbrath, as attorney for said Woldt, $1,362.50 by his personal check, which was the whole amount due, said Milbrath, as such attorney,

making and delivering to said Hinkley a satisfaction and discharge of said mortgage, which was duly recorded in the office of the register of deeds April 7, 1905. (8) At the time of such payment said Hinkley had no knowledge of any assignment of said mortgage or that plaintiff had any interest therein, and acted in good faith. (9) Plaintiff was the owner and holder of the note and mortgage and permitted said Milbrath to represent himself as authorized to receive payment of the note and satisfy the mortgage. Said Milbrath and the C. W. Milbrath Company, of which he was president, had for many years acted as agent of plaintiff in loaning money upon notes and mortgages and in receiving payments thereon. The amount due on the note and mortgage in question was placed to the credit of plaintiff on the books of the Milbrath Company, but he received no money nor knew of the fact.

Upon such findings the court held that the mortgage was extinguished, and that the defendants, executors of the last will and testament of George M. Hinkley, were entitled to judgment dismissing the complaint with costs. Judgment was accordingly rendered, from which plaintiff appealed.

For the appellant there was a brief by *James T. Drought,* attorney, and *Lawrence A. Olwell,* of counsel, and oral argument by *Mr. Drought.*

Edgar L. Wood, for the respondents.

MARSHALL, J. So far as the findings are concerned, to the effect that Hinkley paid the mortgage indebtedness to C. W. Milbrath on the faith of the mortgage appearing of record in the name of Wilhelm Woldt and a power of attorney thus appearing authorizing Milbrath to loan money upon mortgages and to release, satisfy, or assign all notes and mortgages owned by Woldt and to collect all rents and lease, sell, and convey all real estate and personal property and to perform other acts for and in the name of said Woldt, whether they are open to successful attack as contrary to the clear pre-

ponderance of the evidence is not deemed material. Therefore, we will not follow in detail the argument of counsel for appellant on that branch of the case.

The evidence is undisputed that the official records, at the time Hinkley paid the money to Milbrath, showed that the mortgage was outstanding in the name of Woldt and that C. W. Milbrath was his attorney to do the things heretofore mentioned. It is also undisputed that interest on the note, as the same became due, was for many years paid to Milbrath and by him paid to the one entitled thereto on production of the paper, and that Hinkley and his agent, supposing from the state of the record that Milbrath possessed authority to receive payment of the principal of the note and to discharge the mortgage, made such payment and received a release of the mortgage, as stated in the findings. Whether Hinkley was warranted in relying on the record, as he did, is the first question to be determined.

Counsel for respondents in support of the affirmative of the proposition stated cite *Marling v. Nommensen,* 127 Wis. 363, 106 N. W. 844; *Friend v. Yahr,* 126 Wis. 291, 104 N. W. 997; and *Mason v. Beach,* 55 Wis. 607, 13 N. W. 884. A brief analysis thereof will suffice to show that they do not apply to the situation before us.

In *Mason v. Beach,* the discharge of the mortgage was made by the plaintiff pending foreclosure thereof after he had transferred his interest to another who concealed the transaction. The court held that, under the statute permitting an action after the transfer of the plaintiff's interest to be continued in his name or in the name of the assignee, in case no substitution is made, as to persons having no notice of the transfer, the plaintiff is to be regarded as possessing authority to deal with the subject of the litigation as owner thereof. No comment is necessary to show that such doctrine does not rule this case.

In *Friend v. Yahr,* the plaintiff dealt with the real estate

by taking an assignment of a mortgage thereon and a note secured thereby, relying on a release of a prior mortgage by the person having title thereto of record. On that branch of the case the question of whether one is warranted in paying a mortgage indebtedness to the record owner relying wholly on the record, the securities not being in possession of such owner, was not involved. The precise point decided is indicated by the following language used in the opinion:

"A person taking a mortgage from the payee will not be held chargeable with notice that the notes secured in the first mortgage have been assigned, but he may rely upon the record, as showing title in his mortgagor."

On the question of whether the mortgage discharged was extinguished as between the owner thereof and the payor the case turned on whether the record, but not the real, owner who made the release had possession of the securities with authority to collect the indebtedness at the time payment was made.

In *Marling v. Nommensen,* the person claiming that effect should be given to a release of a mortgage by the record owner dealt with the real estate by purchasing the same on the faith of such release. That involved the question decided in the first branch of *Friend v. Yahr.* The mortgage indebtedness had been paid to such record owner after he had assigned the note and mortgage and parted with possession thereof to another, who failed to record his assignment, as in this case. These contentions were made: first, the debt secured by the mortgage is paid and the mortgage therefore extinguished; second, the defendant is entitled to protection by the recording act in dealing with the realty, as he did, in the belief that the release of the mortgage was duly authorized. The court said as to the first proposition it "is fully negatived by our former decisions. The maker of a negotiable promissory note can satisfy it only by payment to the owner at the time or to such owner's authorized agent. If the recipient of the money

is not actually authorized the payment is ineffectual unless induced by unambiguous direction from the owner or justified by actual possession of the note." Citing *Bartel v. Brown,* 104 Wis. 493, 80 N. W. 801; *Kohl v. Beach,* 107 Wis. 409, 83 N. W. 657; *Loizeaux v. Fremder,* 123 Wis. 193, 101 N. W. 423. On the second point the court held that the assignee of the mortgage by allowing the assignor to appear of record as owner was estopped from claiming want of authority of the latter to discharge the mortgage as to the person who purchased the land on the faith of such discharge. Thus a clear distinction was drawn between the status of one as regards the owner, under an unrecorded assignment, of a mortgage on his land, who has paid the mortgage indebtedness to the record owner of such mortgage and obtained a release from him, and his status as regards a person who, relying upon the record of such a release, has dealt with the land by taking a mortgage thereon or deed thereof.

From the foregoing it seems plain that Hinkley was inexcusably negligent in paying the mortgage indebtedness to Milbrath, relying for the latter's authority solely on the condition of the record as regards the ownership of the securities and the authority of Milbrath. If the payment had been made to the record owner himself after he parted with the title and possession of the securities it would not, as we have seen, have worked any prejudice to the appellant as regards the maker of the note or person liable for the indebtedness. Payment of the indebtedness to be efficient to extinguish the mortgage could only be made to the owner of the securities or his authorized agent, and authority of the agent could not be implied except from possession by him of the securities. In *Bartel v. Brown, supra,* the court thus declared the law to be:

"The importance of protecting the holders of commercial paper is so great that to warrant finding that a person who assumes to have authority to receive payment of the principal

sum on any such paper, has such authority, possession of the paper itself by such person, or proof *aliunde* of express authority, is indispensable. . . . If money be due on a written security, it is the duty of the debtor to see that the person to whom he pays it is in possession of the security. . . . The payor is negligent if he relies on anything less, and must abide the event of being able to establish, by clear and satisfactory evidence, an express agreement between the holder of the security and the supposed agent, authorizing the latter to represent the former in the transaction."

So it will be seen that implied authority of Milbrath to receive the money from Hinkley for the owner of the note and mortgage could be based only on possession by him of the securities and capacity to deliver the same upon payment being made. It being conceded that he did not have such possession, payment to him did not affect the right of appellant, as to the payor, unless the appellant expressly authorized Milbrath to receive the money for him.

Whether the learned trial court grounded the judgment wholly on the theory that Hinkley was, by the recording act, warranted in treating Woldt as owner of the securities and Milbrath as entitled to represent him does not appear with absolute clearness. After finding in detail all the facts bearing on that phase of the case the court found that plaintiff permitted Milbrath to represent himself as having authority to do what he did, and that he and his company had for many years acted as plaintiff's agent in loaning money upon notes and mortgages and receiving payment of principal and interest thereon, a regular account being kept between them of the transactions, and that payment was received from Hinkley by Milbrath and credited by him to appellant on his company's books, but without appellant's knowledge. If that means no more than that appellant permitted Milbrath to represent himself as authorized to do what was done because of neglect to put the assignment on record, it is immaterial, as we have seen. The finding is somewhat ambiguous, as we read it.

If as a whole it means that Milbrath was expressly permitted by appellant to receive money, principal or interest, as the same became due on notes and mortgages obtained by the latter through the former's agency, including the one in suit, and to pay the money over to appellant upon production of the securities, then the judgment complained of is right, if there is evidence warranting the finding.

The presumptions are rather against the existence of error than in favor thereof. *Edwards v. Smith,* 48 Wis. 254, 3 N. W. 758; *Heer v. Warren-Scharf A. P. Co.* 118 Wis. 57, 64, 94 N. W. 789. Error must clearly appear to be efficient to disturb the decision of a trial court. So we should approach the consideration of such a question as that in hand from the viewpoint that the leaning should be towards supporting rather than defeating the judgment, while not hesitating to do the latter for prejudicial error efficiently appearing.

In construing an ambiguous finding the same rule should prevail as in the construction of a contract or a law. That one of two or more reasonable probable meanings of the language used should be adopted which will make the same material and will support the judgment rather than one which will defeat it, and in solving the matter resort should be had to the evidence dealt with by the finding.

Here, as before indicated, all facts relating to the record and the question of whether the situation in that regard gave Hinkley good ground to make the payment to Milbrath as agent of Woldt, were covered before reaching the finding in question. There was left to be considered the evidence tending to show that Milbrath was authorized by appellant to act for him in receiving payment of the mortgage indebtedness. Now the indications are pretty strong that the court did not intend to go any further by the finding under discussion than to decide that appellant held Milbrath out as having authority to do what he did. Whether the language used would admit, reasonably, of a different construction un-

der the rules before stated we have concluded to resolve in the negative, since counsel for respondent freely concedes that "no finding was made by the court below as to the authority to collect the principal upon this mortgage so as to constitute a payment of the debt." Whether such authority existed or not was really the turning question in the case and should have been passed upon. Possibly the learned court intended to do so by the language of the ninth finding.

It is contended that authority in fact for Milbrath to receive the money from Hinkley for appellant was shown by the evidence. So we should examine the record and determine, under the established practice, whether the case can be finally disposed of upon the appeal even if the vital question was not passed upon below. In such situation if the record discloses with reasonable and satisfactory certainty a preponderance of evidence in favor of the existence of the fact essential to support the judgment it may be found here accordingly and the litigation terminated the same as if there were a finding on the point by the trial court. *Brown v. Griswold,* 109 Wis. 275, 280, 85 N. W. 363.

While express authority from appellant to Milbrath to receive the money from Hinkley is essential to defeat the former's claim it is not necessary that such authority should appear in writing or be established by direct evidence. There is evidence undisputed to the effect that appellant obtained several notes and mortgages from Milbrath or his company besides the one in question and that in all such cases both the principal and interest had customarily been paid to Milbrath or said company as collector for appellant and the money then paid over to him when he called therefor and produced his papers. The evidence is also all one way that interest on the note in suit was, during a period of over ten years, collected and paid over in that way and that business between Milbrath and his company and the appellant was carried on in such way for some twelve or fifteen years. Milbrath testified substan-

tially as follows: I do not remember that I ever had authority from *Bautz* to collect principal. There was never anything said about it. I do not think we had any understanding about the collection of the principal upon his mortgages. No talk of any specific authority that I remember. The company had an account with *Bautz* on its books. It will be seen that Milbrath failed to deny, directly, that he and his company did have authority, generally, from *Bautz* to collect the principal on his mortgages as had been done from time to time. *Bautz* testified that he thought Milbrath or his company collected several mortgages for him; that he did not tell them to do so, but closed the subject by saying, when a mortgage was due and the parties wanted to pay, I expected Mr. Milbrath would receive the money for me. All those that were paid that I know of he did receive the money and handed it over to me. I always had the notes and mortgages in my possession. In addition there is the significant circumstance that Milbrath in the particular transaction and, apparently, in all the others, was designedly left to appear as the proper person to discharge the mortgages upon the indebtedness being paid, and it fairly appears that, in general, when the principal of a mortgage was paid all appellant did in the matter was to deliver his papers to Milbrath, leaving the latter to clear the record and to transmit such papers to the persons entitled thereto. Such evidence, circumstantial and direct, points so strongly to the existence of actual authority in Milbrath to receive the money from Hinkley as appellant's agent that a finding to that effect certainly could not be disturbed as against the clear preponderance of the evidence. We are constrained to hold, without further discussing the evidence in detail, that it clearly and satisfactorily preponderates in favor of the theory that *Bautz* expected, when any one desired to pay off any mortgage he had obtained from Milbrath or his company, that the money would be received as it was in the instance in question and that such expectation was based on

general authority, authority in fact, from him to so transact the business.

The result of the foregoing is that the mortgage in suit was extinguished by the payment made by Hinkley's agent to Milbrath, and that the judgment should be affirmed.

By the Court.—So ordered.

HEUBNER, Plaintiff in error, vs. THE STATE, Defendant in error.

February 23—March 19, 1907.

Criminal law and practice: Separation of jurors: Preliminary remarks by judge to jury: Improper statements by counsel: Immaterial errors: Murder: Evidence.

1. Mere separation of the jurors before they were impaneled and sworn is not ground for reversal of a conviction in a capital case.
2. A cautionary statement by the trial judge to the jury before the examination of witnesses, as follows: "You will listen to the evidence of each of the witnesses, and bear in mind the appearance of the witnesses upon the stand and the impress that the evidence of these witnesses makes upon your mind, and especially as to whether the evidence is credible or truthful or is not the truth," *held* entirely proper.
3. Where the district attorney in his opening remarks to the jury improperly stated that he expected to prove a certain fact, but the trial judge promptly stopped him and stated that such proof would not be allowed, and there was no objection or exception taken to the remark and no request for any instruction or caution to the jury on the subject, there was no prejudicial error.
4. Upon a prosecution for the murder of defendant's bastard child, the evidence is *held* sufficient to show that the child was born alive and had an independent existence with respiration and circulation before the act was committed.

APPEAL from a judgment of the circuit court for Price county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

For the plaintiff in error there was a brief by *James Smith,* attorney, and *G. E. Schwindt,* of counsel, and oral argument by *Mr. Schwindt.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* state law examiner, and oral argument by *Mr. Messerschmidt.*

WINSLOW, J. The plaintiff in error was prosecuted upon the charge of murdering her newly-born bastard child. It appeared that the child was found dead in an outbuilding or henhouse on the premises of the accused where the delivery had taken place a few hours previously, with a cloth or rag wrapped several times around its neck and another rag stuffed in its mouth. No one was present when the delivery took place except the mother herself. There was a spring lock on the door of the henhouse, and it appears that the accused came out of the henhouse shortly after the birth, shutting the door and leaving the baby in the building, and made her way with the help of a daughter to her dwelling, where she went to bed and a physician was called. She testified that she remembered nothing after the birth of the child. There was evidence showing that the door of the henhouse was locked and that no person had access to it after the birth and before the child was found until the physician who had been summoned to attend the accused went to the henhouse and found the child in the condition described. There was a verdict of murder in the first degree, and the accused sued out a writ of error to reverse the judgment rendered on the verdict. The errors alleged will be considered in their order.

1. The jury was finally selected and the challenges on both sides exhausted near the close of a day's session, and the court allowed the jury to separate for the night under a strict caution not to speak with any one concerning the case. Upon the following morning at the opening of court the jurymen took their places, and, after having severally satisfied the court

in answer to questions that they had obeyed the instructions of the court during the recess, they were sworn and the trial commenced. It is claimed that the court committed prejudicial error in allowing the jurymen to separate, although they had not yet been sworn. We have not been referred to any authorities in support of this proposition. The rule is well settled that, if a jury in a capital case is allowed to separate during the trial, a verdict of conviction will be set aside unless it be made to appear positively that such separation was not followed by improper conduct on their part nor by any circumstance calculated to exert an improper influence on the verdict. *State v. Dolling,* 37 Wis. 396; *Hempton v. State,* 111 Wis. 127, 86 N. W. 596. This rule only applies, however, after the jury has been sworn and the trial commenced. This court has held that where eleven jurors accepted by the parties in a capital case were allowed to separate before the panel was filled, and it did not appear that any of them had been improperly influenced, no prejudicial error was committed. *Clifford v. State,* 58 Wis. 477, 17 N. W. 304. The weight of authority supports the proposition that mere separation of jurors before they are impaneled and sworn is not ground for reversal. 12 Cyc. 673; *State v. Burns,* 33 Mo. 483.

2. After the jury was sworn and before the examination of any witness the trial judge made some general cautionary statements to the jury as to their duties during the trial, among which was the following:

"You will listen to the evidence of each of the witnesses, and bear in mind the appearance of the witnesses upon the stand and the impress that the evidence of these witnesses makes upon your mind, and especially as to whether the evidence is credible or truthful or is not the truth."

This statement is complained of, but we have been unable to see upon what substantial ground. It seems to us to have been entirely proper, and certainly cannot be considered prejudicial.

3. The district attorney, in his opening remarks to the jury, stated that he expected to prove that five or six years before the alleged murder the accused gave birth to a bastard child, and the court immediately stated that unless he had authority for the admission of such evidence he would not be allowed to prove the fact. The district attorney refrained from further statement on this line, and no objection or exception was taken to the remark, nor was the court requested to give any charge or caution to the jury on the subject. The statement of the district attorney was probably improper, although it appears from the record that he had a theory that he would follow the proof by evidence showing that the accused was subjected to public odium on account of the birth of the former bastard, and hence had a reason for concealing the birth of the second bastard. The court, however, promptly and decisively stopped the remarks at the beginning, and would doubtless have given an instruction or warning to the jury to disregard the statement had it been requested. In view of the prompt action of the court, we are unable to say that there was any prejudicial error in the remark.

4. It is contended that there was no sufficient evidence to show that the child was born alive and had an independent existence with respiration and circulation before the act was committed. This claim seems to be entirely unfounded. Three physicians took part in the *post mortem* examination of the body, and it appeared that numerous tests were made of the lungs, stomach, and intestines, and that all tests showed that they contained air, and that this was practically conclusive evidence that the child had breathed several times; that the ears stood out from the head; that the hair was dry and clean; that there was no putrefaction; that there was discoloration of the skin of the neck; and that the lungs gave out a crackling sound when pressed—all of which characteristics would have been absent had the child been stillborn. From their examination the physicians all testified that in their

judgment the child was born alive and breathed, and that its death was caused by strangulation and asphyxiation resulting from the cloth wrapped around its neck and the rag shoved into its mouth.

After a careful examination of the record we are compelled to say that the proof seems ample to sustain the verdict of murder, and that the trial was in all respects fair and free from prejudicial error.

By the Court.—Judgment affirmed.

NIEZORAWSKI, Plaintiff in error, vs. THE STATE, Defendant in error.

February 23—March 19, 1907.

(1) *Construction of statutes: Use of formal rules.* (2–10) *Criminal law and practice: Grand juries: List of jurors where deposited: Use in other courts: Oath of stenographer where filed: Immaterial errors and irregularities: Examination of jurors: Instructions to jury: Evidence as to reputation: Reasonable doubt: Corroboration of witnesses: Compromise verdict.*

1. In the construction of a statute it should be considered first from the viewpoint of good faith, common sense, and impartiality, and formal rules of interpretation should be invoked only when doubts otherwise unsolvable arise.
2. Under sec. 2546*a*, Stats. (Supp. 1906; Laws of 1903, ch. 90), requiring the record book in which the grand jury list is entered to be deposited with "the clerk of the court of such county, who shall securely keep the same so that the" list shall not become known, such book is to be deposited with the clerk of the circuit court.
3. When a grand jury is to be drawn in a municipal court or other inferior court, the grand jury list, after being deposited with the clerk of the circuit court, is to be removed (in proper custody) to the office of the clerk of such inferior court, and is to be returned after the drawing.
4. The fact that a book so removed remained in the office of the clerk of the inferior court for some months and until after a

second grand jury was drawn from the list, was an irregularity, but in this case not prejudicial.

5. The oath which the stenographer employed by a grand jury is required by sec. 2546*f*, Stats. (Supp. 1906; Laws of 1903, ch. 90), to "make and file," should probably be filed with the clerk of the grand jury, but an error in this respect would not make the stenographer a disqualified person or an interloper among the grand jurors, or be prejudicial.

6. Under secs. 4659, 4706, Stats. (1898), no exceptions are available in a criminal case except such as relate to rulings which the appellate court can see, from the record returned, actually prejudiced the defendant in his defense upon the merits.

7. A juror who testified that upon the question of the guilt or innocence of the defendant he had no preconceived opinion, no bias or prejudice, and that he understood and thought he could apply the presumption of innocence in defendant's favor, is *held* competent and qualified, although he also said he thought that, as between defendant and one against whom no indictment was found or legal charge made, there was a greater possibility or more likelihood of the defendant being guilty than there was of such other person being guilty. Metaphysical inquiries as to the matter last mentioned were not within the proper scope of the examination into the juror's qualifications.

8. A requested instruction to the effect that the testimony as to the good reputation of defendant as to his honesty and integrity might, if believed, be in itself sufficient to raise a reasonable doubt as to his guilt, is *held* to have been properly denied; and the charge given, to the effect that such testimony should be considered in connection with all the other evidence and that the jury should convict or acquit according as they should or should not, from all the evidence, be satisfied of defendant's guilt beyond a reasonable doubt, is approved.

9. A requested instruction, with reference to testimony as to the bad reputation of a witness for truth and veracity, as follows: "If from such testimony you are satisfied that the said witness has been impeached, or you have a reasonable doubt on account of such testimony as to his credibility, you should disregard his testimony given in this case, except as to those parts, if any, in which such testimony has been corroborated by other credible witnesses," was properly denied because it directed, not merely permitted, the jury to disregard his testimony, because it limited the corroboration to testimony of witnesses, thereby excluding circumstances and documents, and because it required corroboration by more than one witness.

10. The facts that a verdict of guilty was accompanied by a recommendation of mercy, and that before separating the jury handed to the judge a written request for leniency toward the defendant, do not show that the verdict was a compromise verdict which must be set aside.

ERROR to review a judgment of the municipal court of Milwaukee county: A. J. VINJE, judge of the Eleventh circuit, sitting for the municipal judge. *Affirmed.*

The plaintiff in error (hereinafter called the defendant) was convicted of the crime of bribery. A fine of $800 was imposed on defendant, which he paid under protest. The errors assigned and argued relate to the drawing of the grand jury which returned the indictment in question; the regularity of its proceedings in the particulars hereinafter mentioned; the refusal to submit to the jury certain instructions requested by defendant; and the refusal to set aside the verdict and grant a new trial upon the ground that the verdict was a compromise verdict.

For the plaintiff in error there was a brief by *Hoyt, Doe, Umbreit & Olwell,* and oral argument by *A. C. Umbreit* and *F. M. Hoyt.* They contended, *inter alia,* that an opinion or impression of a juror as to the guilt or innocence of one accused of crime constitutes a well recognized ground of challenge. Such opinion or impression is at least a *prima facie* cause for exclusion. *Sneed v. State,* 47 Ark. 180; *Zimmerman v. State,* 56 Md. 536. Although some cases hold that an opinion or impression which requires evidence to remove does not necessarily disqualify a juror, yet the majority of cases hold that such an opinion does disqualify. *State v. Beuerman,* 59 Kan. 586; *Marion v. State,* 20 Neb. 233; *State v. Lattin,* 19 Wash. 57; *Greenfield v. People,* 74 N. Y. 277; *Palmer v. State,* 42 Ohio St. 596; *Polk v. State,* 45 Ark. 165; *Stephens v. People,* 38 Mich. 739; *Brown v. State,* 57 Miss. 424; *Dugle v. State,* 100 Ind. 259; *State v. Ricks,* 32 La. Ann. 1098; *Myers v. Comm.* 79 Pa. St. 308; *State v. Culler,*

82 Mo. 623. The fact that the court by extremely leading and suggestive questions induced the juror to explain his answers and thus apparently neutralized their natural and logical effect does not alter the situation or establish the qualification of the juror. *Coughlin v. People,* 144 Ill. 140, 38 N. E. 1. If the examination of a juror shows that he is disqualified, such subsequent statements that he can be fair and impartial, render a verdict according to the law and evidence, and will give the defendant the benefit of the presumption of innocence and of a reasonable doubt, are immaterial and do not qualify. *People v. Miller,* 125 Cal. 44; *Meyers v. State,* 97 Ga. 76, 95; *Woods v. State,* 134 Ind. 35; *State v. Start,* 60 Kan. 256; *People v. Evans,* 72 Mich. 367; *State v. Foley,* 144 Mo. 600; *Cancemi v. People,* 16 N. Y. 501; *Fouts v. State,* 7 Ohio St. 471; *Comm. v. Cleary,* 148 Pa. St. 26; *State v. James,* 34 S. C. 49; *Galicke v. State,* 47 Tex. Crim. Rep. 296; *State v. Clark,* 42 Vt. 629; *Washington v. Comm.* 86 Va. 405; *State v. Rutten,* 13 Wash. 203. The great weight of authority is in favor of the doctrine that testimony of good reputation may in itself be sufficient to generate a reasonable doubt, and if an instruction to that effect is requested it should be given. *Fields v. State,* 47 Ala. 603, 11 Am. Rep. 771; *Felix v. State,* 18 Ala. 720; *Springfield v. State,* 96 Ala. 81, 38 Am. St. Rep. 85; *Wagner v. State,* 107 Ind. 71, 57 Am. Rep. 79; *State v. Northrup,* 48 Iowa, 583, 30 Am. Rep. 408; *State v. Lindley,* 51 Iowa, 343, 33 Am. Rep. 139; *Comm. v. Leonard,* 140 Mass. 473, 477; *People v. Jassino,* 100 Mich. 536; *People v. Laird,* 102 Mich. 135; *Hanney v. Comm.* 116 Pa. St. 322; *Remsen v. People,* 43 N. Y. 6; *People v. Brooks,* 131 N. Y. 321; *State v. Barth,* 25 S. C. 175, 60 Am. Rep. 496; *State v. Daley,* 53 Vt. 442, 38 Am. Rep. 694; *Becker v. Comm.* (Pa.) 9 Atl. 510; *People v. Hancock,* 7 Utah, 170, 25 Pac. 1093; *State v. Sauer,* 38 Minn. 438, 38 N. W. 355; *State v. Holmes,* 65 Minn. 230, 68 N. W. 11; *People v. Van Dam,* 107 Mich. 425, 65 N. W. 277; *Redd v. State,* 99 Ga. 210, 25 S. E. 268;

Shropshire v. State, 81 Ga. 589, 8 S. E. 450; *People v. Ashe,* 44 Cal. 288, 292; *People v. Bell,* 49 Cal. 485; *People v. Doggett,* 62 Cal. 27; *Jupitz v. People,* 34 Ill. 516; *Stewart v. State,* 22 Ohio St. 477; *State v. O'Connor,* 31 Mo. 389.

For the defendant in error there was a brief by the *Attorney General* and *A. C. Titus,* assistant attorney general, and by *F. E. McGovern,* district attorney, of counsel, and oral argument by *Mr. McGovern.* They argued, among other things, that Dewey was an impartial and fully qualified juror. *Baker v. State,* 88 Wis. 140, 150–153; *Hughes v. State,* 109 Wis. 397, 401–403; *Sutton v. Fox,* 55 Wis. 531, 534–540; *Grace v. Dempsey,* 75 Wis. 313, 320, 321; *People v. Hughson,* 154 N. Y. 153, 160. Such an instruction as that asked with reference to the testimony as to defendant's good reputation has been held erroneous in the following cases: *Grant v. State,* 97 Ala. 35, 11 South. 915; *Miller v. State,* 107 Ala. 40; *Goldsmith v. State,* 105 Ala. 8, 16 South. 933; *Briggs v. Comm.* 82 Va. 554; *State v. McNamara,* 100 Mo. 100, 107; *Olds v. State,* 44 Fla. 452, 33 South. 296; *Hammond v. State,* 74 Miss. 214; *Maclin v. State,* 44 Ark. 115; *State v. Snow,* 3 Penne. (Del.) 259, 51 Atl. 607. See, also, *State v. Leppere,* 66 Wis. 355, 360; *Schutz v. State,* 125 Wis. 452, 458; 12 Cyc. 600.

TIMLIN, J. The defendant demurred to the indictment, but, evidently aware that the alleged irregularities in the drawing of and in the proceedings by the grand jury did not appear on the face of the indictment and that the questions he desired to present could not be raised by demurrer, there was presented, upon motion to quash the indictment and opposing affidavits, a state of facts showing that the jury commissioners for Milwaukee county in June, 1903, selected a list of persons to serve as grand jurors in that county for the ensuing year and entered the names upon a suitable record book, certified to the same, and deposited such book with the

clerk of the circuit court for Milwaukee county, with whom it remained until about December 1, 1903, when it was taken to the municipal court of the same county for the purpose of drawing therefrom a panel of grand jurors to serve for the December, 1903, term of the municipal court. The book thereafter remained with the clerk of the municipal court, and from the remainder of the list therein contained there was also drawn the panel of grand jurors for the February, 1904, term of the municipal court, which indicted the defendant. After the second grand jury was drawn the book was returned to the clerk of the circuit court. The stenographer who attended the sessions and reported the testimony of witnesses before the grand jury filed his oath with the secretary of the grand jury.

Sec. 2546*a*, Stats. (Supp. 1906; Laws of 1903, ch. 90, sec. 2): "Immediately after such grand jury list has been completed said commissioners shall enter the names of the persons composing it upon a suitable record book kept for the purpose and shall certify over their respective signatures that such list is correctly entered and recorded therein and shall thereupon deposit such record book with the clerk of the court of such county who shall securely keep the same so that the grand jury list entered and recorded therein as aforesaid shall not become known."

We are urged, upon the grounds that this is (1) a penal statute, (2) in derogation of personal rights, (3) in derogation of common-law procedure, and (4) one creating a statutory criminal procedure, to construe this law strictly. But rules of construction are at best only secondary aids.

"A sentence, or form of words, can have but one true meaning. There can be no sound interpretation without good faith and common sense." Lieber, Hermeneutics (Hammond's ed.) 108, 109. "No display of critical ingenuity, no hollow pretense of conformity to established rules, can make an interpretation acceptable, if it evidently proceeds from any other motive than an honest desire to learn the true meaning of the text in question." Id. 290.

Herein lies the weakness of ascertaining the meaning in the first instance by formal rules. To approach a sentence or writing with a purpose of excluding from its meaning everything not covered by the express terms thereof, or by necessary implication therefrom, is the mental attitude of the person predisposed to strict construction. To approach a sentence or writing with a purpose of including within its terms everything either covered by its words expressly or to which its provisions may by mental alertness or ingenuity be extended is the mental attitude of the person predisposed to liberal or "equitable" construction. Neither is correct. Neither is impartial. We grant that after the statute is first considered from the viewpoint of good faith, common sense, and impartiality, and from this viewpoint some question arises with regard to the inclusion or exclusion from its provisions of certain matters or things, this subordinate phase of interpretation may in some cases be determined upon a consideration of whether or not the statute is one of that class which the legislature is presumed not to have intended to be extended by interpretation; and, for the purpose of ascertaining this, the rules of interpretation classifying statutes may be consulted with benefit. We use the terms "construction" and "interpretation" as synonymous.

The futility of the general use of rules of interpretation is nowhere better illustrated than in that elaborate and learned treatise, Lewis's Sutherland's Statutory Construction (2d ed. vol. 2, pp. 1073, 1074), where the conclusion is reached that remedial statutes are liberally construed, and that remedial statutes include all those which remedy defects in the common law, or any part thereof, or remedy defects in any part of our civil jurisprudence generally. The author therefore hardly escapes from the conclusion that all statutes are to be liberally construed. In the same way, by application of that oft-quoted rule that statutes in derogation of the common law are to be strictly construed, it is easy to establish that all statutes

except those needless statutes declaratory of the common law should receive a strict construction. We shall approach the consideration of this statute, therefore, without either favor or hostility, neither leaning to strict nor to liberal construction, and only invoking rules of interpretation after doubts otherwise unsolvable arise.

We consider first that the statute is a general law applicable to every county in the state. The circuit courts always have criminal jurisdiction in this state, whatever other courts may exist. Const. art. VII, sec. 8. The legislature may create municipal courts for a municipality or inferior courts for the county. Const. art. VII, sec. 2. "There shall be a clerk of the circuit court chosen in each county." Const. art. VII, sec. 12. The statutes relating to municipal and inferior courts present quite a variety of regulations and conditions. In how many of them is there a "clerk of the court of such county?" Certainly not in those which, while having a separate clerk, are limited in their jurisdiction to cities. If the circuit court has criminal jurisdiction, should there be two lists and two books kept? The statute mentions only one. If we cannot find warrant in the law for two grand jury lists for a county, and we are confined to the question which clerk is more nearly within the above-quoted words, the clerk of the municipal or inferior court or the clerk of the circuit court, would we not ordinarily understand it to refer to the latter? Why should we select the particular and inferior instead of the general and superior? The third section of the act in question—sec. 2546*b*, Stats. (Supp. 1906; Laws of 1903, ch. 90, sec. 3)—contains words indicating that the list is to be used in selecting a grand jury for more than one court: "Whenever any court or judge thereof shall direct a grand jury to be summoned." The grand jury is to be drawn in the presence of the commissioners and "the judge of the court ordering the grand jury." The persons drawn shall be "the grand jury for said court." We must hold that this statute

requires this list and book to be filed with the clerk of the circuit court and that the proceedings in the case at bar were in this respect regular.

Premising that the grand jury list was filed in the first instance with the proper officer, as required by statute, a consideration of other statutes upon the same subject matter leads to the conclusion that it must be removed thence (in proper custody) to the office of the clerk of that inferior court in which the grand jury is to be drawn. The fact that this book and list remained in the office of the clerk of the municipal court from December, 1903, until after February, 1904, was an irregularity, it is true, but we are unable to see that any prejudice to the defendant resulted therefrom.

The stenographer which the grand jury is authorized to employ is required to "make and file an oath faithfully to report and transcribe all the proceedings before the said grand jury and to keep inviolate the secrecy required by law to be kept relative to such proceedings." No designation of the place of filing or the person with whom the oath must be filed is found in the act. The oath must evidently be an affidavit in writing. It might with almost equal propriety be filed with the clerk of the court of which the grand jury at this stage of the proceedings has become a part, or with the clerk of the grand jury. The former would be more conducive to permanency, the latter to secrecy. We incline to the view that it should be filed with the clerk of the grand jury, as was done in this case. But any error in this respect could not have the effect of making the stenographer a disqualified person or an interloper among the grand jurors. *State ex rel. Dithmar v. Bunnell, post,* p. 198, 110 N. W. 177. Besides, here again no prejudice to the defendant resulted.

"No indictment or information shall be deemed invalid nor shall the trial, judgment or other proceedings thereon be affected: . . . by reason of any other defect or imperfection in matters of form which shall not tend to the prejudice of the defendant." Sec. 4659, Stats. (1898).

"No *indictment, information, process, return or other proceedings* in a criminal case in the courts or course of justice shall be abated, quashed or reversed for any error or mistake where the person and the case may be rightly understood by the court, and the court may, on motion, order an amendment curing such defect." Sec. 4706, Stats. (1898).

These statutes are in the interest of the public and not unjust to the accused because they secure to him a trial on the merits, and they should be applied to and govern the decision of every criminal case, making unavailing all exceptions except such as relate to rulings which the court can see, from the record returned, actually prejudiced the defendant in his defense upon the merits.

Francis E. Dewey, one of the petit jurors, examined as to his qualifications, testified that he did not know defendant, had formed or expressed no opinion as to defendant's guilt or innocence, was conscious of no bias or prejudice against him, had no interest in the result of the trial, and knew of nothing to prevent him (Dewey) from deciding the case fairly and impartially according to evidence. He had, however, read of the case in the newspapers about the time the indictment was returned, and from the fact that the grand jury returned an indictment against the defendant he would presume that there was more chance of defendant being guilty than some man against whom no indictment had been returned. This fact created a presumption in the juror's mind that the defendant was possibly, not probably, guilty, but he would have the same impression if the defendant had been brought into court in the ordinary way after preliminary examination. He thought he could say, notwithstanding this, that his mind was absolutely free from all opinion as to the guilt or innocence of the defendant, for this idea was not strong enough to be an opinion—it was but an impression. He thought that the defendant was more possibly guilty than a man against whom no indictment had been returned, and the fact of an indictment he considered some evidence that the defendant was pos-

sibly guilty, but this impression could be easily removed by evidence to the contrary, and he knew it was not incumbent on the defendant to prove his innocence, but that it was incumbent on the state to prove defendant guilty. He said that it would require evidence to remove his impression, but he could enter upon the trial with a mind absolutely free from any impression as to the guilt or innocence of defendant; that his impression was very slight and could easily be removed, but he did not think a grand jury would indict an innocent man. He knew that a person charged with crime, even when indicted by a grand jury, is presumed to be innocent until the evidence shows him to be guilty beyond a reasonable doubt, and he could and would give the defendant the benefit of that presumption, and he had not in his mind any opinion, feeling, or impression that the defendant was probably guilty, but only that he was possibly guilty; that a man who had been indicted by seventeen men was more likely to be guilty than a man who had not been so indicted. The juror was challenged for cause, and the challenge being overruled the defendant duly excepted. All such inquiries are necessarily somewhat metaphysical, but, as we understand the mental condition of this juror as described by himself, as between defendant and one against whom no indictment was found or legal charge made, there was a greater possibility or more likelihood of the defendant being guilty than there was of such other person being guilty. But with reference to the other question, of the guilt or innocence of defendant, he had no preconceived opinion, no bias or prejudice, and understood and thought he could apply the presumption of innocence in defendant's favor. The distinction is very subtle, and we are glad to be relieved from passing upon its soundness. We hold that the metaphysical test applied to this juryman was not within the proper scope of an examination into his qualifications and that the juryman was competent and qualified, without reference to these subtle distinctions which are much easier of utterance than of explanation.

The instructions requested by the defendant and refused by the court are not correct in law, and the subject thereof is much better covered in the charge given by the court. With reference to evidence of the good reputation of defendant the instructions requested were:

"If you believe the testimony of the witnesses called who testified to the good reputation of the defendant as to his honesty and integrity, such testimony may be in itself sufficient to raise in your minds a reasonable doubt as to his guilt of the offense charged in the indictment, and if you entertain such doubt you must return a verdict of not guilty."

The defendant had no more right to have this evidence separately pointed out by the court to the jury as such which "may be in itself sufficient to raise a reasonable doubt" than he would have to take any other item of evidence from which an inference favorable to the defendant might be raised and call it separately to the attention of the jury with this particular comment, almost suggestion. The charge of the court on this subject shows the proper way of presenting such matters to the jury by instruction. We quote it for precedent:

"Testimony has been received as to the good reputation of the defendant for honesty and integrity previous to the time it is alleged he committed the offense charged in the indictment. Such testimony of good reputation should be considered by you in connection with all the other evidence in the case, and if after such consideration you entertain any reasonable doubt as to the guilt of the defendant, you must acquit him; but if from all the evidence in the case, including the testimony as to the good reputation of the defendant, you are satisfied of his guilt beyond a reasonable doubt, then it is immaterial what his reputation has heretofore been as to honesty and integrity."

The instruction requested, as follows, was not proper to be given, in that it directed, not merely permitted, the jury to disregard the testimony, and in that it limited the corroborating testimony to witnesses, thereby excluding circumstances

and documents, and in that it required corroboration by "witnesses." It therefore was properly refused.

"If from such testimony you are satisfied that the said witness has been impeached, or you have a reasonable doubt on account of such testimony as to his credibility, you should disregard his testimony given in this case, except as to those parts, if any, in which such testimony has been corroborated by other credible witnesses."

It is next contended that because the jury accompanied their verdict of guilty with a recommendation of mercy, and immediately thereafter and before separating handed up to the trial judge a written request for leniency toward the defendant, we must presume that the verdict of guilty was a compromise verdict and must be set aside. This contention cannot be sustained. Verdicts of this kind were sustained in the following cases: *Stephens v. State,* 51 Ga. 236; *State v. Potter,* 15 Kan. 302; *State v. Gill,* 14 S. C. 410; *People v. Lee,* 17 Cal. 76; *Hicks v. State,* 25 Fla. 535, 6 South. 441; *Penn v. State,* 62 Miss. 450.

We find no prejudicial error in this case, hence the judgment should be affirmed.

By the Court.—The judgment of the municipal court is affirmed.

DUTHEY, Plaintiff in error, vs. THE STATE, Defendant in error.

February 23—March 19, 1907.

Criminal law and practice: Homicide: Degrees: "Involuntary killing:" "Heat of passion:" Defendant's declarations, when not conclusive: "Justifiable" and "excusable" homicide: Insanity: Opinion evidence: Form of questions: Instructions to jury: Summarizing contentions of counsel: Information which should not be given: Evidence: Reporter's minutes: Conduct of trial judge.

1. Refusal by the trial court to submit the question whether defendant was guilty of a lower degree of homicide than that of

which he was convicted was prejudicial error if the evidence, in any reasonable view, could support a conviction of such lower degree.

2. Where the killing was by a pistol discharged by the volition of the defendant, without any element of accident or inadvertence, it was not an "involuntary" killing within the meaning of secs. 4355, 4362, Stats. (1898).

3. The killing of defendant's wife with a pistol, claimed by him to have been done while he was temporarily insane because of her misconduct, is *held* upon the evidence not to have been within sec. 4363, Stats. (1898), covering "every other killing," etc., than those covered by other sections.

4. Upon the evidence (stated in the opinion) it is *held* that the jury might have found that the killing of his wife by defendant with a pistol was in heat of passion and without a design to effect death so as to make the crime manslaughter in the third degree, as defined in sec. 4354, Stats. (1898).

5. A defendant's own declarations, even under oath as a witness, are not conclusive against him if other evidence justifies an inconsistent conclusion as to the fact. Thus, defendant's testimony asserting delirium and unconsciousness of his acts at the time of killing his wife did not preclude the jury from finding from other evidence that there was merely that blind anger which the law calls heat of passion.

6. A killing not involving any element of self-defense or enforcement of a duty cannot be a justifiable homicide under sec. 4366, Stats. (1898).

7. A killing by the use of a dangerous weapon cannot be an excusable homicide under sec. 4367, Stats. (1898).

8. When a nonexpert witness is to be asked his opinion as to a person's sanity the question should be, substantially: What impression was made upon your mind by the conduct, actions, manner, expressions, and conversation which you observed?

9. A physician was asked whether, assuming the truth of certain facts stated and of the testimony of the defendant which he heard, he saw in those facts and that testimony any indication that defendant was suffering at any time from melancholia. *Held*, that the question was proper and that answers thereto by the witness, "I see no signs of melancholia," and "There is no evidence of melancholia in that testimony," were not objectionable in form.

10. Although upon the trial of the issue as to insanity of the defendant the presumption is in favor of sanity, the jury should not be instructed that this throws upon him the burden of proof and that to escape he must produce evidence of insanity suffi-

cient to raise a reasonable doubt. The proper instruction is simply that if, after considering all the evidence before them, there remains in the minds of the jury any reasonable doubt of sanity, they should find the defendant insane.

11. If, in charging the jury, the court attempts to summarize and declare the contentions made by either party he should do it with great care and only after being assured that he appreciates not only what those contentions are but their relative importance as viewed by counsel.

12. To be a ground of reversal, an omission from such a statement by the court should have been called to the attention of the trial court by a request that the thing omitted be supplied.

13. However sane one may have been at all other times, if he was actually insane within the legal definitions at the time he committed the criminal act he is not responsible. It was error, therefore, to instruct the jury, in effect, that if defendant while sane determined upon the killing of the deceased he must be found sane although thereafter he became insane and was so at the time of the homicide.

14. One cannot be held criminally responsible for acts done while he was actually insane, even though his mental state was brought about by his own fault in yielding to anger or passion.

15. It was improper for the trial court, in reply to a question asked by the jury while they were deliberating upon the issue of sanity, to inform them that if they found the defendant sane the same jury would afterwards pass upon the question of his guilt or innocence. The court should have told them that such information had no relevancy to their duty in respect to the issue before them.

16. It is the duty of the trial court, especially when so requested, to instruct the jury specifically as to their duty to acquit if they entertain a reasonable doubt as to the guilt of the defendant.

17. Upon the trial of the issue of guilty, permitting the court reporter to read his minutes of the testimony given by defendant on the trial of the issue of sanity was not error merely because there was no other reporter to take down the oral testimony so read to the jury.

18. Conduct of the trial judge is criticised, in that he took occasion, when the jury had returned into court during their deliberations, to explain his course and vindicate his acts and motives, with reference, particularly, to a complaint of defendant's counsel, in his argument, that the lower degrees of homicide had not been submitted to the jury. The minds of the jury should not have been diverted from their duty by any discussion as to propriety of conduct of court or counsel.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

Writ of error to review a conviction for murder in the second degree, for that the plaintiff in error, hereafter called the defendant, murdered his wife, on the 3d day of September, 1905, by shooting her. The proof of specific facts was almost without dispute. The defendant, thirty-eight years of age, a laborer, had been married about eight years to the deceased, who had two children, a girl and a boy, four and eight years of age, respectively. He was domestic and industrious in habit and had accumulated some considerable property. He became suspicious of the relations of his wife with one Langreet and one Blyenberg. At his wife's persuasion he gave her $500, whereupon she took the daughter, eight years old, and disappeared. He later discovered that she was in Seattle living with Langreet. He went there to break up the relations, but was met by his wife with conciliatory proposals and they returned to Superior. She, however, refused to live with him, but occupied a separate house belonging to her brother. He became persuaded that she had deceived him in order to screen Langreet at Seattle. On the night preceding the killing he learned that Langreet had returned and that he and defendant's wife intended to marry. According to his testimony, this situation created such a condition of mental and nervous disturbance as to entirely unbalance him. He describes the situation as well as he can, in broken English, he being a Belgian: On the next day he sees Blyenberg and Langreet together and imagines that they are making him subject of ridicule, and later sees Langreet with his wife and conceives similar conduct on their part, some time about 5 o'clock p. m. on the day of the shooting. From that time he describes himself as wholly unable to remember his acts, although he recalls certain isolated facts. Between 7 and 8 o'clock he went to the saloon of Blyenberg, where Langreet was likely to be, went up to the bar and shot Blyenberg, and it is supposed would

have shot Langreet, but the latter made his escape through the back door. Thereafter he went seven or eight blocks to the house where several persons, including his wife, were sitting, pushed open the door, thrust his right hand with the revolver through it, and shot, the bullet striking his wife so that she died before morning. He professes to have had no knowledge of shooting her, and was greatly distressed when so informed the next day. A plea of insanity was introduced, which was tried separately, and a verdict of sanity found, and thereupon, on trial of the issue of guilt or innocence, he was found guilty of murder in the second degree and duly sentenced.

W. P. Crawford, for the plaintiff in error.

The cause was submitted for the defendant in error on the brief of the *Attorney General* and *A. C. Titus,* assistant attorney general, and of *W. R. Foley,* of counsel.

DODGE, J. 1. The most radical and conclusive assignment of error, though not the first in order on the brief, is the refusal of the trial court to submit any other degree of homicide than murder in the first and second degrees, although specifically requested in writing to submit third and fourth degrees of manslaughter. If the evidence, in any reasonable view, could support either of these lower degrees, this refusal was error, from which prejudice to the defendant is undeniable. *Perkins v. State,* 78 Wis. 551, 558, 47 N. W. 827; *Terrill v. State,* 95 Wis. 276, 291, 70 N. W. 356; *Murphy v. State,* 108 Wis. 111, 117, 83 N. W. 1112; *Montgomery v. State,* 128 Wis. 183, 197, 107 N. W. 14. Each of these crimes may be committed in different ways, and one phase of each consists in the *involuntary* killing. Secs. 4355, 4362, Stats. (1898). Since the discharge of the pistol, a dangerous and deadly weapon, was clearly by the volition of the accused, so that there was no element of accident or inadvertence therein, this element of involuntary killing, as distinguished from a killing

merely without a design to effect death, could not, in any view of the evidence, have existed in the light of the definition of involuntary killing as recently promulgated in *Johnson v. State,* 129 Wis. 146, 108 N. W. 55, 59. Nor do we think it possible to have been concluded from the evidence that any phase of homicide covered by sec. 4363, Stats. (1898), occurred; that is the omnibus section, for "every other killing of a human being by the act, procurement or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared in this chapter murder or manslaughter of some other degree, shall be deemed manslaughter in the fourth degree." When, however, we turn to sec. 4354, Stats. (1898), we find it to declare:

"Any person who shall kill another in the heat of passion without a design to effect death, by a dangerous weapon, in any case except such wherein the killing of another is herein declared to be justifiable or excusable, shall be deemed guilty of manslaughter in the third degree."

It will be noted that the distinguishing elements here are (1) heat of passion; (2) absence of design to effect death; and (3) by a dangerous weapon. That there was evidence to establish heat of passion, as the phrase is used in the law, the trial court was, evidently, fully convinced; for, throughout the charge on the issue of sanity, he over and over again explained to the jury the duty to refrain from a finding of insanity if the acts were due merely to heat of passion,—instructions which, in themselves, must have been erroneous and prejudicial if there was no evidence of such a state of mind. There can be little doubt, however, but that the jury might have found such a condition to exist. The evidence shows the defendant in a much perturbed and erratic mental condition for some days before the homicide, from the relations between his wife and Langreet, and shows, as expressed in the statement of facts, certain very disturbing events and information on the night before and the day of the killing,

indicating to him that he had been deceived in the apparent partial reconciliation and reformation of his wife, but that a renewal of her relations with Langreet was intended by both. The sight of the man himself on this day, and especially the sight of him and the wife about 5 o'clock in the afternoon, flaunting their intimacy in public, and, as he believed, accompanying it with signs and conduct of ridicule of himself, were all events which might well produce that blind anger which the law calls heat of passion; and, while the defendant in his own testimony asserts rather delirium and unconsciousness of his acts, this statement might have been disbelieved by the jury and the inference of violent passion drawn from the facts that an hour or two later he equipped himself with his revolver, rushing to the saloon where he expected to find Langreet and his companion and abettor, Blyenberg, and there, in the midst of a number of people, shot Blyenberg and pursued Langreet, and after that was seen rushing, apparently blindly, along the sidewalk, so that people had to make way for him, to places where he apparently suspected his wife and Langreet might be, until he reached her brother's house, where, thrusting open the door of a room containing herself, a brother of Langreet, and several other persons, he fired his pistol, without pause, his presence having occupied but a second of time according to the testimony of the witnesses. A defendant's own declarations, even under oath as a witness, are not conclusive against him if other evidence justifies an inconsistent conclusion as to the fact. *Montgomery v. State*, 128 Wis. 183, 107 N. W. 14. There was other evidence which might have been construed by the jury as indicating the confused or even unconscious condition of mind or the blindness of rage and passion, consisting in description of defendant's conduct during the same period of time.

The next characteristic of the crime described by this section is that the killing shall be without a design to effect death. The evidence already recited, the suddenness of the shooting

upon the throwing open of the door into a room where were seated a large number of persons, the remark accompanying that act, "I am not allowed to come in here anyhow," and the showing of confusion, excitement, and nonobservance of things about him, seem to us fully sufficient to have warranted the jury in believing that the shot was fired with no design to kill any particular person, even though the defendant were not in that irrational state which the law recognizes as insanity. These were supplemented by proof of exclamations and apparently unpremeditated utterances made the same evening after arrest and next morning, indicating ignorance of and surprise at the fact of her injury and death.

That the third element, namely, the use of a dangerous weapon, existed, is undisputed. All these things might have existed without there having been either justifiable homicide, as described by sec. 4366, or excusable homicide under sec. 4367, of which we shall have to speak later. We are persuaded, therefore, that defendant was entitled to have the jury pass upon the phase of manslaughter in the third degree defined in sec. 4354, and that refusal of the request for instruction to that effect was error necessitating reversal and new trial.

2. We may say in this connection, for convenience, that we find no phase of the evidence at all consistent with justifiable homicide defined in sec. 4366, each phase of which involves some element of self-defense or enforcement of a duty; nor of excusable homicide under sec. 4367, which is excluded by use of a dangerous weapon, if by no other circumstance. Hence must be overruled assignments of error upon refusal to submit such sections to the jury. Having reached the conclusion that the judgment must be reversed and new trial ordered, we proceed to consider such of the other assignments of error as present questions liable to have any significance upon such trial.

3. The state called the jailer who received defendant into custody, and first proved by him that he had a large experi-

ence as jailer in dealing with insane people, such as were committed to his custody; also that he had a certain limited conversation with the defendant after his arrest a few hours after the shooting, and he was then asked:

"From your knowledge gained from such observation and care of those people and from *Duthey's* actions, conversations, and manner and appearance as you saw him at the jail Saturday night, September 23d, and as you testified here, would you say he was sane or insane? *Answer:* Sane."

Hardly any question of mere practice is so clouded by an indigestible mass of rulings, dicta, and decisions as that of the admissibility of opinions of nonexperts as to sanity. What Mr. Wigmore in his work on Evidence calls the arsenal from which have been drawn all subsequent arguments in favor thereof is the dissenting opinion of DOE, J., in *State v. Pike,* 49 N. H. 399, The confusion on the subject is partially illustrated by an extended note to *Ryder v. State,* 100 Ga. 528, 28 S. E. 246, 38 L. R. A. 721. Practical application of rules with reference to it will be found in *Burnham v. Mitchell,* 34 Wis. 117, 133; *Yanke v. State,* 51 Wis. 464, 8 N. W. 276; *Boorman v. N. W. Mut. R. Asso.* 90 Wis. 144, 62 N. W. 924; *Crawford v. Christian,* 102 Wis. 51, 78 N. W. 406; *In re Guardianship of Welch,* 108 Wis. 387, 84 N. W. 550; *In re Butler's Will,* 110 Wis. 70, 85 N. W. 678; *Hempton v. State,* 111 Wis. 127, 137, 86 N. W. 596; *Lowe v. State,* 118 Wis. 641, 655, 96 N. W. 417; *Schultz v. Culbertson,* 125 Wis. 169, 103 N. W. 234. A little consideration of the reasons why anything more than evidence of the actual physical facts observed by the witness should be allowed to be stated would greatly aid courts and counsel in this field. First, it is obvious that one not an expert can no more aid the jury by an expert opinion as to sanity than any other fact or condition. If all the physical facts can be stated, the jury are as competent to form an opinion as the witness, and their province ought not to be invaded. But all experience teaches the frequent if not

general impossibility of stating all things which the eye and ear note in an interview with another, the wildness of the eye, the incoherence of the ideas in speech, hurried or erratic manner, and the like. Ordinarily it is impossible for the narrator either to remember the specific acts, words, and gestures or to adequately describe them so as to convey to his hearer their significance to the real information desired, namely, the mental state, without stating that they were excited, incoherent, unreasonable, unusual, or the like, all of which is but statement of conclusion or opinion. Hence the rule has grown that the ordinary observer may so state his impression of his interview. Courts have seemingly been unable to express verbal distinctions between the mere statement by a witness as to the impression on his mind of certain acts narrated as fully as he can and a declaration of opinion generally that the person was sane or insane, and a direct inquiry as to such opinion is now sanctioned by the weight of authority, with which the expressions in our own decisions agree. The subject received lucid treatment at the pen of HARLAN, J., in *Conn. Mut. L. Ins. Co. v. Lathrop,* 111 U. S. 612, 4 Sup. Ct. 533, which case presents ideal illustration of the best manner of propounding the proper question to the witness. After a conversation had been narrated, the manner described as agitated, face flushed and expressionless, the question was propounded, substantially, "What impression was made upon your mind by the conduct, actions, manner, expressions, and conversation which you observed?" This was fully approved. We do not mean that there would be error in the direct inquiry as to witness's opinion as to the person's sanity, based, of course, on what he saw and heard; but the form quoted above is much more likely to prevent confusion in the mind of the witness and to impress the jury with the true significance of the testimony. The question here was inaccurate and improper, in that it directed the witness to base his opinion as to defendant's general sanity, in part at least, on what he had observed

in others committed to him for incarceration and custody as too dangerously insane to be at large. It also obviously presents an insidious attempt to dignify to the jury the witness's opinion as that of an expert, instead of a mere lay observer, by reason of his frequent contact with insane persons.

4. A physician, who had heard part of defendant's testimony and most of the other testimony on the issue of sanity, and who was informed, by a preliminary hypothetical question, of certain salient portions of defendant's testimony which he had not heard, was asked:

"Now, Doctor, assuming these facts I have stated to be true, and assuming the testimony of the defendant which you heard to be true, do you see in those facts and that testimony any indication that this man was suffering at any time from melancholia?"

This is objected to as calling on the expert to weigh evidence and thereby perform the function of the jury. The answer finally given, after several objections, was to a reiteration of the same inquiry by the court, which did not contain all the restrictive elements of the question above quoted, but referred thereto, so that we think the witness could have understood it only as embodying those restrictions. The question of the manner in which an expert's opinion can properly be taken upon the result of evidence already introduced was examined and discussed in the case of *Cornell v. State,* 104 Wis. 527, 537, 80 N. W. 745, and if, as we hold, the answer was finally given in response to the quoted question, it is apparent at a glance that none of the objections pointed out in that opinion exist. The question was confined to certain facts stated and certain other facts testified to by a single witness, and the expert was directed to answer upon the assumption of the truth of such testimony, so that there was no demand upon him to weigh evidence or to select between conflicting evidence or testimony that upon which he predicated his opinion. We think there was no error in permitting him to answer, nor in

the form of his answer, which was, "I see no signs of melancholia." We think that could have been understood only as expressing his professional opinion. The same construction must be given to another form of answer, "There is no evidence of melancholia in that testimony."

5. Error is assigned upon an instruction on the issue of sanity as follows:

"The jury is instructed that the defendant comes to trial presumed to be sane and not insane. This throws upon him the burden of proof in the first instance. To escape, he must produce evidence of insanity at the time of the homicide sufficient notwithstanding all the evidence to the contrary to raise a reasonable doubt of his insanity as aforesaid."

This method of expression is unfortunate, to say the least of it. While the proposition is no longer debatable in Wisconsin that upon such an issue the presumption is in favor of sanity, and the jury are to so find unless evidence leaves them in reasonable doubt on that subject, yet it is by no means true that the defendant must produce that evidence, nor produce evidence sufficient to raise a reasonable doubt. That doubt may arise just as well from evidence produced by the state or from the very circumstances of the act charged, and the proper instruction on that subject is simply that if, after considering all the evidence before them, there remains in the minds of the jury any reasonable doubt of sanity, their duty is to find the accused insane. Such is the express behest of the statute. Sec. 4697, Stats. (1898). Indeed, the rule of law that there is a presumption of sanity goes little, if any, further than to constitute a rule of practice to the effect that, in the absence of any evidence bearing on the subject, there is no issue to be submitted to the jury. It is a rule important to the courts, but the communication of which to the jury is of doubtful propriety. We do not need to declare whether in every case an instruction such as that now criticised must be held reversible error. There is considerable analogy between the sugges-

tion that the defendant must produce the evidence to overcome the legal presumption of sanity and instructions to the effect that the evidence, or the defendant's evidence, must raise a reasonable doubt, which were criticised in *McAllister v. State,* 112 Wis. 496, 500, 88 N. W. 212, and *Baker v. State,* 120 Wis. 141, 97 N. W. 566, as tending to pervert the mental attitude of the jury from one of needing to be convinced that there is some reason why they should not believe in innocence, to that of needing to be convinced that there is reasonable doubt of guilt.

6. Another portion of the charge which is assigned as error is the following:

"It is contended by the defense that the alienations of the affections of his wife, her debauchment, and the breaking up of his family so affected his nervous system, so overcame and crushed him, that for a space of time covering the homicide reason was dethroned, conscience paralyzed, and the shooting of the deceased an act for which he was not responsible, and the jury is instructed that if such was the fact, or there is reasonable doubt whether or not such was the fact, they will find the defendant insane."

In framing this instruction the court entered a field which is always perilous, namely, that of attempting to state to the jury the contentions of either party. It is in close analogy to attempts to state the evidence which we considered in *Horr v. C. W. Howard Co.* 126 Wis. 160, 165, 105 N. W. 668. When fairly and exhaustively done it may be helpful to the jury, but the view of the court is so liable to differ from that of counsel as to what are the most salient and important elements of the latter's contention that any attempt in this direction is liable to be the subject of criticism as having omitted or subordinated the things upon which he most confidently relies. This attempt is an apt illustration. The circumstances on which appellant lays principal stress as accounting for a state of mind which he claims to have been irrational and insane were those attending the renewal of intimacy and personal

contact between Langreet and his wife, occurring on the very day of the homicide, while these events narrated by the court in this instruction were largely preliminary thereto and significant merely as preparing appellant's mind to be seriously affected by the events of that day, so that appellant comes here with the feeling that those things which he most confidently believes should have led the jury to believe in insanity were in effect withdrawn from their attention, or, if not withdrawn, at least belittled by the court in this instruction. We probably should not consider such an omission a ground of reversal in absence of any request by the defendant that it be supplied, but if the court attempts to summarize and declare the contentions made by either party he should do it with great care and only after being assured that he appreciates not only what those contentions are, but their relative importance as viewed by the counsel.

Further error is assigned upon the following instruction:

"The court, however, instructs the jury that if following the conduct of the deceased which the defendant claims to have been the cause of the homicide, while he still had power to reason and distinguish right from wrong as to the act in question, and conscience still protested, he determined upon the death of the deceased, and the homicide followed as the fruit of such determination, the homicidal act relates back to the time of such determination, although the evidence shows that from that moment until he fired the fatal shot he was incapable of rational thought, carried captive to the crime by the fiend of passion and revenge that he had invited to his bosom."

This instruction is most obviously erroneous and, in view of the situation, is prejudicially misleading. When analyzed it informs the jury that if one, while sane, determines upon the killing of another, they must find him sane although thereafter he became insane and was so at the time of the homicide. There is no limit of time declared which may not elapse between the reaching of the determination to kill and the time

when he does the act. In this case there was considerable evidence of a declaration by defendant the night before of a purpose to kill somebody, supposed to include Blyenberg, Langreet, and his wife. A large share of the events upon which the contention of insanity was predicated occurred after this, so the jury were directed by this instruction that if they believed defendant had reached this purpose the night before, and that he was then not insane, they must find him sane for the purposes of this case, although by after events he became entirely deranged and incapable, as the court phrases it, of rational thought. Nothing is more certain in the law than that the question of insanity as a defense to crime relates to the moment of the offense. However insane one may have been at any previous time, that is no defense if not existent at the crucial moment, and, conversely, however sane at all other times, if actually insane within the legal definitions at the time he committed the criminal act, he is not responsible. Such is the question which sec. 4697 requires to be submitted to the jury with the further command that, if such fact be found, defendant be declared not guilty for that reason.

7. Further error is assigned upon an instruction as follows:

"So, if the defendant's act in shooting his wife was the result of temporary frenzy or passion arising from excitement or anger and not from mental disease or temporary dethronement of reason not brought about by his own fault in yielding to anger or passion, then he is not exempt from criminal responsibility."

The vice complained of in this instruction, which also pervaded several others not specifically assigned as error, is that the jury were thereby informed that mental disease or temporary dethronement of reason would not exempt from criminal responsibility, provided they were brought about by his own fault in yielding to anger or passion. We cannot escape the view that such an impression was reasonably capable of being conveyed by this charge, whether it was really the idea

in the judge's mind or not. A statement of the proposition seems to leave little necessity for comment or discussion. If a man is insane, if mental disease exists which destroys his capacity to rationally apprehend the significance of his acts or his responsibility therefor, or if, in the language of the court, his reason is dethroned, he is exempt from criminal responsibility, however that condition came about. This subject received consideration in *Terrill v. State,* 74 Wis. 278, 42 N. W. 243, where the trial court instructed that insanity, to be a defense, must not have been voluntarily assumed, as by the use of intoxicating liquors, etc. This was held erroneous on the ground that, if insanity actually existed, its efficacy as a defense could be in no wise impaired by the fact that it had been brought about originally by the voluntary act of accused, citing *Reg. v. Davis,* 14 Cox C. C. 563. In *Hempton v. State,* 111 Wis. 127, 135, 142, 86 N. W. 596, the same principle was discussed with reference to a disturbed mental state sufficient to disable an accused from premeditated design to kill, although not sufficient to constitute insanity, where that condition was brought about by voluntary acts—in that case the use of intoxicating liquor,—and it was again distinctly asserted that the question for the jury was not the means by which the condition was induced, but the existence of the condition, however it arose. In *Johnson v. State,* 129 Wis. 146, 108 N. W. 55, careful explanation was made of the distinction between insanity and that state of frenzy or heat of passion which serves only at best to lower the grade of homicide, but does not exclude criminal responsibility, and of the latter it was there declared:

"It is not inconsistent with intelligent action, with consciousness of what one is doing and of the responsibilities therefor; it is not such as to, temporarily even, dethrone reason, strictly speaking; destroy volition."

Again, it was said to be such as to " 'sway the reason regardless of her admonitions,' but it is not presumed to be, nor

does the heat of passion spoken of contemplate, such overpowering disturbance as to destroy volition, the reasoning faculty, even temporarily." Hence it is obvious that any instruction to a jury that one is held to be responsible for his acts due to mental disease, or to even temporary dethronement of reason, is erroneous, even though that mental state has resulted from his own fault in yielding to anger or passion.

8. While the jury were deliberating upon the issue of sanity they returned in court and asked whether the same jury would have anything further to do with the case if defendant were found sane, to which the court, after some hesitation, gave them an affirmative answer. We cannot approve this course, although we may not feel that prejudice is so apparent that we should deem it ground of reversal in and of itself. The very purpose of sec. 4697, Stats. (1898), is to separate the issue of sanity from the other issues in the case so that the jury may dispassionately view that question, and, having resolved it, if in favor of sanity, may not be embarrassed in their consideration of guilt or innocence by the same questions. The question put by the jury signified at once to the court that at least some of the jurymen were opposed to finding the defendant sane, but that there had been at least some suggestion that this reluctance might be overcome if it was understood that the same jury should have the function of passing upon his guilt or innocence or upon the degree thereof, and the information could have been relevant to no other situation. Instead of aiding such possible compromise of convictions by assuring them that they would continue to try the case, the court should have told them that such information could have no relevancy to their present duty, which was to answer according to their convictions whether the sanity of the accused was established beyond reasonable doubt. Many of the reasons apply to this situation which have induced us to hold, with much persistency, that information to the jury by the court of the effect which answers to specific questions in

a special verdict will have upon the judgment is error warranting reversal. *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 222, 78 N. W. 442; *New Home S. M. Co. v. Simon,* 104 Wis. 120, 126, 80 N. W. 71; *Fox v. Martin,* 104 Wis. 581, 587, 80 N. W. 921; *Musbach v. Wis. C. Co.* 108 Wis. 57, 70, 84 N. W. 36.

9. The defendant's counsel, in writing, requested an instruction to the effect that if the jury had reasonable doubt of the guilt of the defendant they should find him not guilty, refusal of which is assigned as error. The charge before us is unique, in that, from beginning to end, there is no express statement to the jury of their duty to acquit if they entertained a reasonable doubt of any of the phases of homicide submitted to them. Doubtless to the legal mind that duty is implied in the very proper general instruction with which the charge was premised, that the presumption of innocence must prevail and defeat conviction unless overcome beyond a reasonable doubt. After definition of reasonable doubt the court instructed that the jury may, if their judgment and conscience so command, find guilt of murder in the first degree, which he then defines in the words of the statute. He proceeds: "Should the jury not find the defendant guilty of murder in the first degree, then in the second degree," which he then defined. He then summarized:

"If, to conclude, the jury find the defendant guilty of murder in the first degree beyond reasonable doubt, they will so return by their verdict. If they do not find him guilty of murder in the first degree and do find him guilty of murder in the second degree beyond reasonable doubt, they will so return."

It is difficult to understand how a judge could have failed to add at this point the correlative duty, in every respect as imperative, to find a verdict of not guilty if they entertain any reasonable doubt of both first and second degree murder. Juries should not be left to infer their duties from mere implication or inference, and, while omission to expressly direct will

usually not be deemed ground of reversal if it may be thought inadvertent and is not called to the attention of the court, we are unable to conceive of any reason that should restrain a trial judge from directing in express words the duty of acquittal under proper circumstances when his attention is challenged to the subject by request. *Fertig v. State,* 100 Wis. 301, 313, 75 N. W. 960; *Collins v. State,* 115 Wis. 596, 602, 92 N. W. 266.

10. Upon the trial of the issue of guilt the state called to the witness stand the court reporter and asked him to read from his minutes the testimony given by the defendant upon the trial of the issue of sanity. This was objected to on various grounds, but the only one presented as making its admission erroneous is that it was received with no reporter to take the oral testimony so read to the jury. We do not think it erroneous upon this ground. Every purpose of preservation upon the reporter's minutes of that which was conveyed to the ears of the jury was accomplished by his own ability to reduce to shorthand all that passed, except perhaps the reading from a paper, which he could copy at his leisure into his minutes. The bill of exceptions discloses, over the certificate of the judge, exactly what he did read, and we cannot discover that any prejudice could have resulted to the defendant from the irregularity, if it were one. There might have been other grounds why it was improper to allow the testimony to go in, in response to this question. See *Havenor v. State,* 125 Wis. 444, 451, 104 N. W. 116; *Wells v. Chase,* 126 Wis. 202, 105 N. W. 799. But, as none such are argued, and prejudice is certainly very difficult to discover, we do not pass upon them.

11. Since the judgment must be reversed for grounds heretofore stated, we shall not discuss at any length a most unfortunate scene which transpired in presence of the jury at a time when they returned into court in the course of their deliberations upon the issue of guilt or innocence. The court took occasion, upon the text of certain complaint by defend-

ant's counsel in his argument to the jury that the lower degrees of homicide had not been submitted to them, to assure the jury of his anxiety to perform his duty fully to the accused, and that, in his best judgment, subject to the liability of all men to err, he had done so, and had shown the utmost favor which his duty permitted, and would, at all stages, care to an extreme limit for defendant's welfare. The jury was charged with the duty of passing on this defendant's guilt or innocence, and their minds should not have been diverted therefrom by a discussion of any question of propriety of conduct of court or counsel. The jury was not intrusted with the function of passing on such question. If the judge felt that his course required explanation or vindication, that was a question between him and counsel or between him and the public. If he looked upon the members of this jury as representatives of the public, he should have postponed his remarks until they had ceased to be charged with the anxious duty of doing justice between this accused man and the state. He might then, certainly without prejudice to the defendant, have constituted them a forum to which to explain himself and vindicate his acts and motives could he have believed they needed any vindication. We need say no more upon this subject, for it is, of course, not liable to recur upon a new trial, nor need we declare whether prejudice therefrom is or is not so obvious as to have effect upon the integrity of the verdict finally reached.

Several other errors are assigned, but we find all of them so lacking in substantial merit, or so immaterial to another trial, that we cannot feel justified to extend this opinion by their discussion. Neither need we call attention to certain colloquies between court and jury, which serve strongly to indicate that the specific errors discussed were probably effective in inducing the jury to conclusions adverse to defendant in fields of evidence where otherwise they might justifiably have found more favorably to him.

By the Court.—The judgment is reversed and cause remanded for a new trial. The warden of the state prison is directed to deliver the plaintiff in error, *Edward Duthey,* into the custody of the sheriff of Douglas county, to be by him held to abide the further order and judgment of the court.

STATE EX REL. DITHMAR, Appellant, vs. BUNNELL, Respondent.

November 13, 1906—April 9, 1907.

Elections: Nomination papers: Alterations: Votes for person not legally nominated: Bribery: County judges: Filing oath of office: Recording bond: Delay: Vacancies: Appointment: Continuance in office by legislative act: Taking forcible possession of office.

1. Under subd. 3, sec. 30, Stats. (1898), providing that each voter signing a nomination paper shall add to his signature his business and residence, the use of ditto marks (") placed under the business or residence of some former signer is permissible.
2. At an election to fill the office of county judge for an unexpired term and also for a new term thereafter, separate nomination papers for each term were necessary; and after a nomination paper specifying merely the office of "county judge" had been signed the candidate had no right to change it by interlining the words "for the unexpired term."
3. After the name of a candidate has been placed upon the official ballot and the election has taken place, the fact that there had been a wrongful alteration in his nomination papers does not of itself require the rejection of the votes cast for him at the election.
4. It is bribery, under sec. 4478, Stats. (1898), for a candidate for the office of county judge to promise the voters, before the election, that if elected he "will draw all papers necessary in the settlement of estates and give the necessary advice free of charge." But such a promise, in the absence of any proof that any voter was induced thereby to vote for such candidate, is not sufficient ground for rejecting the votes cast for him or ousting him from the office.
5. Where the person elected to the office of county judge filed his oath of office with the county clerk, his failure to file it in the

office of the clerk of the circuit court as required by sec. 2442, Stats. (1898), did not cause the office of county judge to become vacant, said statute being directory, in the absence of any provision expressly declaring a vacancy in case of such failure.

6. The office of county judge did not become vacant merely because the person elected thereto failed, until three months after executing and filing his official bond, to have such bond recorded, as prescribed in sec. 702, Stats. (Supp. 1906; ch. 376, Laws of 1903).

7. The continuance of a person in office by legislative interference, beyond the specific term for which he was elected or appointed, is equivalent to a new appointment to the office, and void if the office be one that the legislature cannot fill by direct appointment or election.

8. Relator was appointed on December 10, 1904, to fill a vacancy caused by death in the office of county judge. On April 4, 1905, defendant was elected for the unexpired term of the deceased judge, ending January 1, 1906. He duly qualified. Under the statutes then in force relator would hold the office until June 5, 1905, and on that day defendant would be entitled to it. On April 21, 1905, ch. 91, Laws of 1905, took effect, providing that "all county judges heretofore appointed to fill vacancies shall hold and continue in office until the first Monday in January, 1906." *Held*, that it was not competent for the legislature thus to nullify the election and continue the relator in office.

9. Upon being refused possession of the office of county judge, the person entitled thereto was justified in forcibly breaking into the office room in the courthouse and taking possession thereof in the absence of the person who claimed such office and had excluded him.

APPEAL from a judgment of the circuit court for Juneau county: J. J. FRUIT, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Barney & Price* and *Veeder & Veeder*, attorneys, and *J. T. Dithmar, in pro. per.*, and oral argument by *Mr. H. W. Barney* and *Mr. Dithmar*.

Daniel H. Grady, for the respondent.

The following opinion was filed January 8, 1907:

CASSODAY, C. J. It appears from the record and is undisputed that December 10, 1904, the governor appointed the relator county judge of Juneau county to fill the vacancy created

by the death of W. G. BEEBE, who had been elected to that office at the regular election in April, 1901. On December 17, 1904, the relator duly qualified as such county judge. The election to fill that office took place April 4, 1905, and at that time there were six candidates for the office, including the relator and the defendant. The votes cast at such election were canvassed by the board, and on April 13, 1905, the result was declared by the board to the effect that for the unexpired term of said office 2,546 votes were cast, of which the defendant received 800, John Price, Jr., 673, and the relator 626, and the balance were scattered among the three other candidates, and that for the full term of said office 3,183 votes were cast, of which the defendant received 926, John Price, Jr., 762, and the relator 669, and the balance were scattered among the three other candidates; and so the county clerk of Juneau county on April 13, 1905, issued to the defendant a certificate of election for said unexpired term and also a certificate of election for the full term of said office. Thereupon and on the same day the defendant took and subscribed the requisite oath and executed the requisite official bond for said unexpired term and filed and deposited the same with the county clerk, and subsequently and on July 17, 1905, recorded said official bond in the register's office of that county. On April 14, 1905, the defendant took and subscribed the requisite oath and executed the requisite official bond for said full term and filed and deposited the same with the county clerk, and subsequently and on July 17, 1905, recorded said official bond in the register's office in that county. On June 5, 1905, the defendant appeared at said office and demanded of the relator the possession thereof, but the same was refused by the relator. On June 7, 1905, the defendant again appeared at said office and demanded of the relator the possession thereof, but the same was again refused by the relator. On July 28, 1905, and while the relator was absent from the state, the defendant broke and entered said office room, put a new lock

upon the door thereof and retained the key to the same, and has ever since held the possession of said office and acted as county judge of said county.

On September 5, 1905, the relator commenced this action of *quo warranto* to determine the right to said office of county judge. The defendant answered the amended complaint. At the close of the trial, the jury impaneled and sworn in the cause, by the direction of the court, found that the defendant had not usurped, intruded into, or wrongfully taken possession of the office of county judge of Juneau county, but that he was then, and was on the date of taking possession thereof, entitled to said office as the duly elected and qualified county judge of said Juneau county, and that *Julius T. Dithmar,* the relator herein, had no cause of action. From the judgment entered in pursuance of such verdict in favor of the defendant and against the relator, with costs, the relator appeals.

1. Under the Statutes of 1898 county judges were to be elected on the first Tuesday of April, 1901, and every fourth year thereafter; and the term of such office was to be four years and commence on the first Monday of January next after such general election. Sec. 2441, Stats. (1898). The same section provided that, when a vacancy should occur in the office of county judge from any cause, the governor should "appoint a county judge, and the person so appointed" should "hold for the residue or for the whole of the term." Id. That section was amended in 1899 by striking out the words "for the residue or for the whole of the term," and inserting in lieu thereof the words "until the first Monday of June next succeeding such appointment." Sec. 2, ch. 7, Laws of 1899. Four years afterwards a statute was enacted, which, as applied to this case, declared that "in all cases of vacancy in the office of . . . county judge, the election to fill such vacancy shall be held on the first Tuesday of April next after the vacancy shall happen." Sec. 4, ch. 10, Laws of 1903. Such were the provisions of the statutes applicable when the

relator was appointed to fill the vacancy created by the death of Judge BEEBE in December, 1904, and also when the election was held to fill that office April 4, 1905. Judge BEEBE was elected for the full term of four years in April, 1901, and of course, had he continued to live, his term would not have expired until in January, 1906. Under the amendments to the statutes cited it is obvious that the relator, by virtue of his appointment, had the right to hold the office "until the first Monday of June next succeeding such appointment," which was June 5, 1905. And so, under the statutes in force at the time of the election April 4, 1905, some one was to be elected to fill the office for Mr. BEEBE's unexpired term; that is to say, from June 5, 1905, to January 1, 1906, and also some one for the full term commencing January 1, 1906. But, as urged by counsel, since the relator was duly appointed, qualified, and in possession of the *de jure* office, he was entitled to hold the same until his successor had been elected or appointed and qualified. Sec. 964, Stats. (1898); sec. 14, art. VII, Const.; *State ex rel. Finch v. Washburn,* 17 Wis. 658; Mechem, Pub. Off. § 397.

2. Counsel contend that the defendant was never nominated for the office. One of the grounds for this contention is that most of the electors who signed the defendant's nomination papers failed to state their residence or business, other than to add ditto marks below the business or residence of some former subscriber, as, for instance, below the words "Farmer," "Plymouth," "Lemonweir," etc. The statute required that each voter should "add to his signature his business and residence, street and number, if any." Subd. 3, sec. 30, Stats. (1898). It seems to be settled that courts will take judicial notice of abbreviations in common use and also the ordinary contractions or abbreviations of Christian names. 17 Am. & Eng. Ency. of Law (2d ed.) 897; 1 Am. & Eng. Ency. of Law (2d ed.) 97–102, citing numerous cases. Thus, it has been held in Indiana:

"The use of a double comma following the name of a subscriber to such articles of association under the name of a certain specified locality sufficiently designates such subscriber's residence." *Steinmetz v. V. & O. T. Co.* 57 Ind. 457. See, also, *Henry v. Armitage,* L. R. 12 Q. B. Div. 257.

Our statutes expressly provide that, in legal proceedings, "such abbreviations as are now commonly used in the English language may be used, and numbers may be expressed by Arabic figures or Roman numerals in the usual manner." Sec. 2578, and subd. 19, sec. 4971, Stats. (1898). We are constrained to hold that the placing of such ditto marks below the business or residence of some former subscriber was a substantial compliance with the statute cited.

3. There is, however, a more serious objection to such nomination papers. After several of them were signed by qualified electors and voters of the county and delivered to the defendant they were changed by interlining the words "for the unexpired term." As already indicated, some one was to be elected for the unexpired term and some one for the full term. The electors were at liberty to so nominate one person for the unexpired term and another person for the term beginning January 1, 1906, or they could nominate the same person for both positions. In fact one of such papers was changed by the defendant by interlining the words "for the unexpired term and the term beginning January, 1906." The nomination papers of each candidate were to have signatures of the requisite per cent. of the voters of the county, and no voter could properly sign more than one nomination paper to the same office. Subd. 3, sec. 30, Stats. (1898). "On ballots to be used at general elections" the statutes expressly provide that, "if any officer to be elected is to fill a vacancy, that fact shall be so specified upon the ballot." The primary election law declared that the provisions of the statutes previously in force in relation to holding and conducting elections and all other kindred subjects should apply to all primaries in so far as they

were consistent with the act. Secs. 12, 16, 20, 25, ch. 451, Laws of 1903; *State ex rel. Pray v. Yankee,* 129 Wis. 662, 109 N. W. 550, 551; *State ex rel. Rinder v. Goff,* 129 Wis. 668, 109 N. W. 628. Thus the statute required separate nomination papers for the unexpired term as well as for the full term. The several nomination papers so signed by the qualified electors, respectively, expressed the choice of the voters signing the same as to who should become the candidate for the office therein specified. For the person therein named, after such signatures had been obtained, to change the name of the office therein prescribed was to practice a gross fraud upon such signers of the nomination papers. True, both sets of nomination papers related to the same office at different periods, but that did not give the defendant any right to so change such papers. The nomination papers were supposed to express the choice of the subscribers, and the person therein named for nomination had no authority to change such papers so as to make them express a different choice. We must hold that the alterations made in such nomination papers were wrongful and without authority.

The question here presented is not whether the name of the defendant as such candidate should have been kept off from the official ballot. That question is fully considered by my brother WINSLOW in the late case of *State ex rel. Rinder v. Goff, supra,* and it is only necessary here to refer to it. The claim here is that, by reason of such alteration, the defendant was never legally nominated as a candidate to fill such unexpired term, and hence that the votes cast for him for that office at the election April 4, 1905, should not have been counted. This is one of the important questions in the case. Counsel have cited one case which supports their contention. *Price v. Lush,* 10 Mont. 61, 24 Pac. 749, 9 L. R. A. 467. It was there held that the provisions of the primary election law, similar to ours, "are mandatory," and that "the name of a person who is not nominated in the manner fixed by the statute cannot

lawfully be published or printed on the official ballot with those of the lawful candidates." It was there further held:

"Officially publishing the candidacy for office of a person not legally nominated and printing his name on the official ballot gives him an advantage to which he is not entitled under the Australian ballot system and will prevent his taking the office, even if elected, although he could have announced himself to the public as a candidate and could then lawfully have received the votes of any electors who chose to vote for him." Id.

In deciding that case the court seemingly lost sight of the right of the elector to exercise free choice at the election, and confined its attention to the mistakes and misconduct of election officers and candidates.

As recently suggested by this court in one of the cases cited, contests over a primary election should be speedily settled before the regular election. *State ex rel. Rinder v. Goff,* 129 Wis. 668, 109 N. W. 628, 633. But a failure to so settle such contests should not operate to disfranchise legally qualified voters. We are not embarrassed by the decision in the Montana case mentioned, since that decision was modified and, in effect, overruled by later decisions in the same court. *Stackpole v. Hallahan,* 16 Mont. 40, 48, 40 Pac. 80; *State ex rel. Brooks v. Fransham,* 19 Mont. 273, 288, 289, 48 Pac. 1. In this last case the court said:

"Where there is a neglect on the part of one to avail himself of this right [given him by statute], he cannot, when the result of the election is announced and he finds himself defeated at the polls, ask the courts to nullify the expressed will of voters upon the ground of the error or wrong of the county clerk, which he could by reasonable diligence have had corrected. . . . If no ante-election objection to a nomination is made, the provisions of the statute are to be treated as directory."

It was there held, accordingly, that, unless the corrections are made before the election, the ballots cannot be rejected because the nominations were not properly made. Id. In reach-

ing that conclusion the court quoted from the opinion of ANDREWS, C. J., and followed a decision in New York, where it is said and held:

"We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake, or even the wilful misconduct, of election officers in performing the duty cast upon them. The object of elections is to ascertain the popular will and not to thwart it. The object of election laws is to secure the rights of duly qualified electors and not to defeat them."

"The votes of innocent electors are not invalidated by irregularities or unauthorized acts on the part of public officers charged with the duty of preparing and printing official ballots when no irregularity or want of authority appears on the face of the ballots." *People ex rel. Hirsh v. Wood,* 148 N. Y. 142, 146, 147, 42 N. E. 536, 537.

To the same effect: *State ex rel. Crawford v. Norris,* 37 Neb. 299, 55 N. W. 1086; *Tutt v. Hawkins,* 53 Neb. 367, 73 N. W. 692; *Allen v. Glynn,* 17 Colo. 338, 29 Pac. 670; *Miller v. Pennoyer,* 23 Oreg. 364, 31 Pac. 830; *Baker v. Scott,* 4 Idaho, 596, 43 Pac. 76. See, also, *Bowers v. Smith,* 111 Mo. 45, 20 S. W. 101, overruled by *McKay v. Minner,* 154 Mo. 608, 614–617, 55 S. W. 866, so far as the statute of that state expressly required. In Michigan it has been held that "voters finding a ticket upon the official ballot are not required to determine whether it is entitled to a place thereon, but may safely rely upon the action of the officers of the law, who, they have a right to suppose, have performed their duty." *Bragdon ex rel. Loranger v. Navarre,* 102 Mich. 259, 60 N. W. 277. See *People ex rel. Hartwick v. Avery,* 102 Mich. 572, 574, 61 N. W. 4; *Horning v. Board of Canvassers,* 119 Mich. 51, 56, 77 N. W. 446. The right of voters to thus rely upon the correctness of the official ballot was discussed by counsel and considered by the court in *State ex rel. Hunt v. Stafford,* 120 Wis. 203, 216–219, 97 N. W. 1043, but was not determined, because it was held by the majority of the court that

mass conventions had not been abolished, and hence that the name of the defendant as the Democratic candidate for sheriff was rightfully on the official ballot. It was discussed, however, by my brother MARSHALL, who had reached the conclusion that mass conventions had been abolished. It may be said, however, that it was then, and is now, the consensus of all the members of this court that the voters have the right to rely upon the correctness of the official ballot. We must hold that the mere fact that such nomination papers of the defendant were changed, as mentioned, did not of itself require the canvassing board to reject the votes cast for the defendant.

4. It is claimed that the defendant was never elected to the office of county judge, either for the unexpired term or the full term, for the reason that he procured the electors to vote for him by bribery. The statutes prescribe the persons who shall be deemed guilty of bribery, and, among other things, declare that "every person" shall be deemed guilty of bribery and be punished as therein prescribed

"who shall, directly or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give or lend, or offer, *promise or promise to procure* or endeavor to procure any money *or valuable consideration,* to or for any voter, to or for any person on behalf of any voter, or to or for any other person in order to induce any voter to vote or refrain from voting, or do any such act as aforesaid, corruptly, on account of such voter having voted or refrained from voting at any election." Secs. 4478, 4478*a,* Stats. (1898).

The statute also declares:

"Any person who shall *obtain* any office by bribery or shall have been elected to any office at any election, at which election he shall have *induced or procured* any elector to vote for him for such office by bribery, shall be disqualified from holding said office, and he shall be ousted therefrom, and said office shall be deemed and held vacant, to be filled by election or appointment as other vacancies, according to law." Sec. 4481, Stats. (1898).

It was held by this court at an early day that "a vote obtained by bribery is illegal and should be rejected on proof thereof in *quo warranto.*" *State ex rel. Hopkins v. Olin,* 23 Wis. 309, 327. In support of that decision it was there said by the court that "the free exercise of the elective franchise by the qualified voters" was "a matter of the highest importance," and that "a vote obtained in direct violation of the statute" should be held to be illegal and disregarded. In a later case it was held by this court:

"(1) If a sum of money, or any property, is offered to individual electors for their votes at any election held under the laws of this state, all votes shown to have been obtained thereby will be rejected by the court in an action to determine the right to the office. (2) In like manner, a vote given for a candidate for any public office in consideration of his promise, in case of his election, to donate a sum of money or other valuable thing to a third party, whether such party be an individual or a county, or any other corporation, will be rejected as void by the court when called upon judicially to declare the result of the election." *State ex rel. Newell v. Purdy,* 36 Wis. 213.

It has been held in Missouri to be

". . . unlawful for a candidate for public office to make offers to the voters to perform the duties of the office, if elected, for less than the legal fees. An election secured by means of such offer is void." *State ex rel. Att'y Gen. v. Collier,* 72 Mo. 13. To the same effect, *State v. Elting,* 29 Kan. 397, 399.

As recently held by this court, in an action of "*quo warranto* to try title to an elective office, two questions should determine the case: How many legal votes were cast for the relator, and how many legal votes were cast for the defendant?" *State ex rel. Leonard v. Rosenthal,* 123 Wis. 442, 453, 102 N. W. 49.

The question recurs whether it appears from the facts presented by the record that the votes cast for the defendant come within the condemnation of the statutes quoted and the principles of law thus adjudicated. The charge of bribery is based

upon a circular letter issued by the defendant March 8, 1905, as the "Republican Candidate for County Judge," and addressed to the "Voters of Juneau County," and purporting to be something for them to think about before voting for county judge. The circular, among other things, contains the following:

"The interest of the party in court demands the economical management of his case. This can be accomplished by having *all advice given and papers drawn* by the county judge, or under his direction, *free of charge*. The law does not permit the county judge to make any charge for such service in probate cases nor does it compel him to perform such service. He may perform it or he may require a lawyer to do it. . . .

"*My Platform.*

"If I should be elected county judge—

"I will not permit unnecessary delay in the transaction of business in the county court.

"I will draw all papers necessary in the settlement of estates and give the necessary advice free of charge.

"I will use my best effort to prevent any unnecessary legal contests.

"I will favor, and assist in, the settlement of estates with the least possible expense, whether for legal fees or otherwise."

One of the other candidates having criticised such offer of the defendant to give all advice and draw all papers free of charge, the defendant, eight days before the election, issued an explanatory letter, stating, among other things, in effect, that he had mailed his former letter "to practically every voter in the county," that he was charged with "no greater offense than the disinterested giving of assistance to parties in his court," and that that gave "plenty of room for the exercise of discretion and common sense in the matter of making papers and giving advice in cases in which there *is no contest*—and such cases are the only ones to which my 'plank' is intended to refer." That explanation is certainly in conflict with the language of the circular and particularly of the platform quoted,

where the defendant expressly promised, if elected, to "draw *all* papers necessary in the settlement of estates *and give the necessary advice free of charge.*" Such promise was clearly within the condemnation of the statutes and adjudications cited. It may be that the defendant only intended to promise that he would draw all papers and give all necessary advice free of charge in cases where he was authorized to do so by statute, but his language is unfortunate and not to be commended.

Under the statute cited it was incumbent upon the relator, in order to oust the defendant from office, to show that the defendant obtained the office by bribery, or, at least, that he "induced or procured" some electors or "elector to vote for him for such office by bribery." Sec. 4481, Stats. (1898). The amended complaint alleges that seven electors therein named were induced and procured by the defendant by bribery in circulating such letter to vote for him for such office at said election. But we fail to find in the record any proof of any voter being induced or procured by bribery to vote for the defendant for such office. To come within the condemnation of the statute it was not only necessary that the defendant should have made the offer, but also that such voters or voter should have been "induced and procured" thereby to vote for him for that office. We must hold that there was no error in refusing to reject the votes cast for the defendant by reason of such circular letter, nor for refusing to oust him from that office by reason of that letter. As indicated in the foregoing statement, at the election April 4, 1905, the defendant received 127 votes more than any other candidate for the unexpired term of said office, and 164 votes more than any other candidate for the full term of said office. It follows from what has been said that the board of canvassers on April 13, 1905, properly declared that the defendant was duly elected to said office for the unexpired term and also for the full term, and thereupon the county clerk properly issued to him a certificate of election for the unexpired term and also for the full term.

5. It is conceded that on April 13 and 14, 1905, the defendant took and subscribed the requisite official oath and executed the requisite official bond for the unexpired term and the full term, respectively, and filed and deposited the same with the county clerk, and subsequently, and on July 17, 1905, recorded each of said official bonds in the register's office. It is contended, however, that the defendant never qualified for the office, either for the unexpired term or the full term. This is based upon two grounds: One is that such oath of office was filed with the county clerk instead of being filed "in the office of the clerk of the circuit court," as required by the statute. Sec. 2442, Stats. (1898). In support of such contention counsel seem to rely upon a decision of this court, made at an early day, holding that the failure to file such oath "in the office of the clerk of the circuit clerk," as thus required, operated to vacate the office, notwithstanding such official oath had been filed with the county treasurer. *State ex rel. Lutfring v. Gœtze,* 22 Wis. 363. The statute then required such oath to "be filed in the office of the clerk of the circuit court," the same as now. Sec. 92, ch. 13, R. S. 1858. But another provision of the statute under which that decision was made expressly declared that every such office "shall become vacant" upon the "refusal or neglect" of the person elected "to take his oath of office, or to give or renew his official bond or to deposit such oath or bond within the time prescribed by law." Sec. 2, ch. 14, R. S. 1858. In pursuance of a suggestion made in the opinion of the court in that case the provision of the statute in respect to vacancies was changed and now reads as found in sec. 962, Stats. (1898). That omits therefrom the provision declaring a vacancy in case of refusal or neglect to deposit or file such official oath in the office of the clerk of the circuit court. In the absence of such express declaration the requirements of the statutes in such cases are generally construed to be directory merely and not mandatory. Mechem, Pub. Off. §§ 262, 266; 23 Am. & Eng. Ency. of Law (2d ed.) 357. Here the requisite oath of office was taken by the de-

fendant immediately upon receiving the certificates of election. The only objection to that oath is that it was filed in the wrong office. Even that objection is not mentioned nor referred to in the amended complaint. We must hold that the office to which the defendant was elected did not become vacant by reason of such oath being filed in the office of the county clerk instead of the office of the clerk of the circuit court.

The other reason for claiming that the defendant never qualified for the office is that his official bonds, which were executed and filed in the office of the county clerk immediately after he received his certificates of election, were not recorded in the register's office until July 17, 1905—about three months after they were so executed and filed. Undoubtedly the statutes required the bonds so executed to "be recorded" by the defendant at his own cost "in the office of the register of deeds," and that the same should "then be filed with the county clerk." Secs. 2442, 702, Stats. (1898); sec. 1, ch. 376, Laws of 1903. What has been said about statutes being regarded as directory is peculiarly applicable to the delay in recording such bond. Thus, it is said by the text-writer mentioned:

"The statutes requiring a bond to be given ordinarily prescribe that it shall be given within a fixed time after the officer's election or appointment. These provisions *as to time,* however, though often couched in most explicit language, are usually construed to be directory only and not mandatory. A failure to give the bond within the time prescribed does not, therefore, *ipso facto* work a forfeiture." Mechem, Pub. Off. §§ 265, 266. See, also, *Glavey v. U. S.* 182 U. S. 595, 21 Sup. Ct. 891; *Cronin v. Stoddard,* 97 N. Y. 271; *Schuff v. Pflanz,* 99 Ky. 97, 35 S. W. 132; *People ex rel. Bennett v. Benfield,* 80 Mich. 265, 45 N. W. 135; *Cawley v. People,* 95 Ill. 249.

We must hold that the office did not become vacant by reason of the defendant's delay in recording the bonds, and that the defendant duly qualified for the office.

6. It is claimed on the part of the relator that his right to the office by virtue of his appointment by the governor was continued and extended by ch. 91, Laws of 1905, from June 5, 1905, when the right to hold such office under such appointment would otherwise have terminated, to January 1, 1906. That act was approved by the governor April 20, 1905, and was published and went into effect April 21, 1905, not only after the defendant had been declared to be elected, but also a week after he had thus received his certificates of election for the unexpired term and the full term and filed the requisite oath of office and bond as stated. Such contention is based upon the provisions of the act, which, eliminating what is inapplicable here, declare:

"In all cases of vacancy in the office of . . . county judge, the election to fill such vacancy shall be held on the first Tuesday of April next after the vacancy happens: . . . Provided that no election to fill a vacancy for . . . county judge shall be held at the time of holding the regular election for such office. . . . When a vacancy shall occur in the office of county judge, . . . the governor shall appoint such judge, and the person so appointed shall hold until the first Monday of June next succeeding an election to fill such vacancy. . . . All county judges heretofore appointed to fill vacancies shall hold and continue in office until the first Monday of January, 1906. . . .

"Sec. 2. This act shall take effect and be in force from and after its passage and publication." Secs. 1, 2, ch. 91, Laws of 1905.

The last clause quoted indicates an intention that the act should be prospective in its effect and force and not retroactive. Such is the ordinary rule of construction where there is nothing in the act to indicate a contrary intent. Here the only provision indicating a contrary intent is the clause declaring, in effect, that "all county judges" theretofore "appointed to fill vacancies" should "hold and continue in office until the first Monday of January, 1906," and that clause was expressly stricken out of the statute and repealed June 6,

1905. Ch. 301, Laws of 1905. As already indicated, the statutes in force April 4, 1905, required that some one should on that day be elected county judge for the unexpired term of Judge BEEBE, deceased. As we have seen, the defendant was elected to that office on that day and, in legal effect, duly qualified a week before the passage of ch. 91, Laws of 1905. Such election and qualification gave to the defendant the legal right to the possession of the office June 5, 1905. He appeared at the office on that day and demanded the possession of the same, but the relator refused to give it up on the ground that his right to the office had been continued and extended by the clause of the act quoted. On the next day that clause was expressly repealed, and on the day after, June 7, 1905, the defendant again appeared at the office and demanded of the relator the possession thereof, but the relator again refused to give up such possession. The question recurs whether the defendant's right to the office during such unexpired term—that is to say, from June 5, 1905, to January 1, 1906—was taken from him by the clause of the act thus repealed. The contention of the relator seems to be that, as the constitution expressly authorized the legislature "to abolish the office of judge of probate in any county, and to confer probate powers upon such inferior courts" as might be established in such county, and since the legislature had conferred such powers upon county courts, therefore the office of county judge is purely statutory.

"In the absence of constitutional restriction it is entirely competent for the legislature of a state to make provision as to when the term of an incumbent, elected or appointed to fill a vacancy, shall expire." 23 Am. & Eng. Ency. of Law (2d ed.) 419.

The constitution also declares that "all county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties . . . as the legislature shall direct." Sec. 9, art. XIII, Const.

The effect of that provision was considered at length by my brother MARSHALL in *O'Connor v. Fond du Lac,* 109 Wis. 253, 264–270, 85 N. W. 327. But little need here be added to the discussion. Here the defendant was elected in the manner prescribed by the legislature to fill the unexpired term from June 5, 1905, to January 1, 1906. After being so elected and qualified it was in our judgment incompetent for the legislature, without cause, to bar him from taking the office and to designate some one else to fill the office during the portion of the unexpired term for which he was so elected. The prescribing of laws for the election or appointment to an office is a legislative function, but that does not include the power of making the appointment itself, much less the nullification of an election held as prescribed by law. *State ex rel. Jameson v. Denny,* 118 Ind. 382, 21 N. E. 253; *State ex rel. Worrell v. Peelle,* 121 Ind. 495, 22 N. E. 654. As said in the *O'Connor Case, supra:*

"Power is not left with the legislature in its discretion to appoint or elect all officers whose election or appointment is not provided for in the constitution." 109 Wis. 266, 85 N. W. 332.

As said in the same case:

"The continuance of a person in office by legislative interference, beyond the specific term for which he was elected or appointed, is equivalent to a new appointment to the office, and void if the office be one that the legislature cannot fill by direct appointment or election." 109 Wis. 268, 85 N. W. 332, citing *State ex rel. Hamilton v. Krez,* 88 Wis. 135, 59 N. W. 593.

We have discussed this question as though the clause in ch. 91, Laws of 1905, relied upon had not been repealed the next day after the defendant was authorized to take possession of the office. The repeal, however, would seem to have taken from the relator any plausible ground for contending that his term of office was continued and extended by virtue of the provisions of that chapter. The result is that the defendant

was rightfully entitled to the possession of the office at the time he so demanded the same.

7. This being so, we must hold that he was justified in taking possession as he did July 28, 1905.

By the Court.—The judgment of the circuit court is affirmed.

TIMLIN, J., took no part.

A motion for a rehearing was denied April 9, 1907.

FREEMAN, Respondent, vs. MORRIS and another, Appellants.

November 14, 1906—April 9, 1907.

Wills: Contract to bequeath property: Consideration: Enforcement: Parties: Indefiniteness of agreement.

1. The privilege of naming a child is a sufficient consideration to support a contract to bequeath property to the child.
2. When the privilege of naming a child has been given by its parents to a third person in consideration of a contract by the latter for the benefit of the child, the child may afterwards ratify the transaction and enforce the contract.
3. An agreement to devise or bequeath something to a person, no particular property or sum being specified, is invalid for indefiniteness and uncertainty; and such infirmity is not removed by subsequent statements, made to third persons by the person so agreeing, that he was going to bequeath a certain sum, nor by wills executed by him containing a bequest of that sum, where such wills were revoked by a later will wholly omitting such bequest.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

The plaintiff's mother, Catherine La Fleur Freeman, is a niece of Reinard R. La Fleur. These parties resided in La Crosse county for many years prior to Reinard R. La Fleur's

death. A few days after plaintiff's birth Reinard R. La Fleur came to the home of her parents and requested that he be given the privilege of naming her, and asked them to bestow on her the name of his deceased wife, *Martha.* She had died in Holland prior to his removal to this country. It was thereupon agreed by plaintiff's parents and Reinard R. La Fleur that he should have the right and privilege of bestowing upon plaintiff the name of *Martha,* and in consideration thereof Reinard R. La Fleur promised and agreed to give, leave, devise, or bequeath something to her; that is, some property. Pursuant to such agreement plaintiff, with the consent of her parents, was named *Martha* by him, and she has ever since borne and retained, and is known by, the Christian name of *Martha.* At the time this agreement was made and the name so given to plaintiff by Reinard R. La Fleur with the assent of her parents, no specific property nor any specified amount was designated or agreed upon by the parties. At various times after the name was so adopted and given to the plaintiff by the parties, Reinard R. La Fleur stated to third parties that he was going to give and devise to plaintiff the sum of $500 for the privilege of having so named her, and he inserted a provision in three wills, made by him after so naming plaintiff, whereby he bequeathed to her $500. He revoked all these wills, and his last will contained no bequest to plaintiff, but wholly omitted to mention her. He died on or about October 4, 1903, without having paid or given plaintiff anything for the privilege of naming her *Martha,* under the agreement with her parents. He left an estate sufficient to pay the sum of $500, now demanded by plaintiff as due her under the agreement under which he exercised the right and privilege of naming her. The circuit court awarded judgment in plaintiff's favor and against the defendants, as executors of the will of Reinard R. La Fleur, deceased, for the sum of $500 and costs, upon the ground that such amount was due the plaintiff under the agreement to name her *Martha,* so made by the de-

ceased and her parents. This is an appeal from such judgment.

For the appellants there was a brief by *Morris & Hartwell*, and oral argument by *Thomas Morris*.

William S. Burroughs, for the respondent.

The following opinion was filed December 4, 1906:

SIEBECKER, J. It is not seriously contested but that the privilege of naming plaintiff, given the testator by her parents, was a valuable one in the eye of the law, and that it has been treated as a sufficient consideration to support a contract in respect to it. This subject was considered, and such privilege held a valid consideration for a contract based on it, in the following decisions: *Babcock v. Chase*, 36 N. Y. Supp. 879; *Parks v. Francis's Adm'r*, 50 Vt. 626; *Wolford v. Powers*, 85 Ind. 294; *Eaton v. Libbey*, 165 Mass. 218, 42 N. E. 1127; *Daily v. Minnick*, 117 Iowa, 563, 91 N. W. 913. These and other authorities cited therein also support the proposition that, though the privilege of naming a child may be one which is regarded as belonging to the parents as the natural guardians of the child, they may waive it and bestow the benefit derived from it on the child, and, when so bestowed in a contract with a third person, it rests on such privity between the parent and child as to enable the child to ratify the transaction and enforce the contract in its favor. See cases cited above.

It is contended that the court erred in finding the contract between plaintiff's parents and the testator was a sufficient and enforceable one. In support of the claim it is averred that the terms of the agreement shown by the evidence were so indefinite and uncertain that they cannot be ascertained and enforced. The agreement proven and found by the court is that testator promised and agreed with the plaintiff's parents that, if he were accorded the privilege of naming the child, he would in consideration thereof leave her something at his

death, and that this was understood by the parties that he would give, devise, or bequeath to her some of his property. It is undisputed that testator named plaintiff pursuant to this arrangement and at various times stated to third persons that he was going to leave her some of his property for having had the privilege of bestowing on her the name *Martha*. He provided for a bequest of $500 to her in three wills made by him; but these were revoked before he made and executed his last will, wherein she is wholly omitted as a beneficiary. From an examination of the terms of the agreement upon which plaintiff predicates her claim, it is apparent that they wholly omit to specify any amount or particular property as agreed upon to be left to plaintiff by testator. This leaves absolutely indefinite and uncertain what plaintiff was to receive. It is true the agreement specified that he would leave plaintiff something, but what that something was to be it is simply impossible to ascertain, and, if it be claimed to apply to money, then we approach no nearer to definiteness, and are still as to the particular amount within the field of uncertainty. The terms give us no standard, either expressly or by necessary implication, by which performance of the agreement can be measured.

It is contended, however, that testator removed this difficulty by fixing $500 as the amount he would leave plaintiff under his agreement, and that this made it a definite and certain consideration. This claim is based upon the facts that he made such declarations to third persons and in wills which he revoked before his death. The terms of the agreement, however, are not that plaintiff was to receive such property or sum of money as testator might suggest to third persons or specify in a will made by him. The agreement contains nothing to show that any such designation was to bind testator and make such specification the amount agreed upon by the parties. Its terms wholly fail to determine the amount or to provide a means by which it can be ascertained or measured. We

receive no such aid from testator's conduct or declarations as removes the infirmities inherent in the contract, and must hold it invalid for indefiniteness and uncertainty. *Adams v. Adams,* 26 Ala. 272; *Walls's Appeal,* 111 Pa. St. 460, 5 Atl. 220; *Daily v. Minnick, supra.*

By the Court.—Judgment reversed, and the cause remanded with directions that the circuit court award judgment dismissing the complaint.

TIMLIN, J., took no part.

A motion for a rehearing was denied April 9, 1907.

AMERICAN FOUNDRY AND FURNACE COMPANY, Appellant, vs. BOARD OF EDUCATION OF THE CITY OF BERLIN and another, Respondents.

December 4, 1906—April 9, 1907.

(1-6) *Sales: Heating apparatus: Guaranty of results: Option to make it heat or refund money: Reasonable time: Acceptance: Use after demand for removal: Evidence as to operation of plant.* (7) *School boards: Meetings: Presumption as to regularity.* (8) *Costs: Change of venue: Witness fees.*

1. The evidence in this case is *held* to sustain a verdict to the effect that heating apparatus furnished by plaintiff and placed in a school building did not fulfil a guaranty that it would warm the rooms of the building to an average temperature of seventy degrees during the coldest weather and at the same time secure good ventilation, and that plaintiff, upon being notified of the fact, failed to make it do so.
2. Heating apparatus furnished by plaintiff was guaranteed to produce certain results, and the contract provided that if it did not do so plaintiff, upon being notified of the fact, would either make it do so or refund all money paid and remove the apparatus. *Held,* that plaintiff, on being so notified, had the option as to which of the two things it would do, but was bound to do one or the other within a reasonable time.

3. Where after repeated notifications and repeated attempts, continuing through two winters and covering a period of a year and a half, plaintiff had failed to make the apparatus fulfil the guaranty, it could not reasonably ask a longer time, but became bound to refund the money paid and remove the apparatus from the building.
4. Where, after due demand and notice made and given at the end of said period, plaintiff had failed to remove the heating apparatus, the subsequent use thereof in the building, in consequence of plaintiff's failure to remove it, did not constitute an acceptance of the apparatus.
5. There having been no change in the capacity or efficiency of the apparatus after such demand for its removal, evidence as to its operation during the following winter was admissible, the conditions being substantially the same as during the previous winters while plaintiff was trying to make it fulfil the guaranty.
6. Where plaintiff's contract required it to furnish registers for the corridors of the building, but did not guarantee the warming of corridors to seventy degrees, it was clearly implied that the corridors were to be warmed to some extent, and it was not error to admit testimony as to the heating thereof, the jury being instructed that under the contract they were not to be heated to seventy degrees.
7. Where the minutes of meetings of a school board affirmatively show that they were called and held pursuant to and as required by a rule of the board, and there is no evidence to the contrary, the presumption that they were so called and held is conclusive.
8. That part of sec. 2625, Stats. (1898), which provides that if the application for a change of venue be made after any continuance in the action obtained by the party applying for such change it shall be granted only upon payment of certain costs, but that no costs for attendance of witnesses shall be included if notice of the application, etc., shall have been served ten days before the commencement of the term, is not applicable where no continuance was obtained prior to the application for change of venue; and in such case fees for the attendance of witnesses at that term are a part of the costs, if any, recoverable by the prevailing party.

APPEAL from a judgment of the circuit court for Waushara county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This is an action to recover the balance due upon contract. It appears from the record, and is undisputed, that August 16,

1901, the defendants, being about to construct a new high school building in the city of *Berlin,* entered into a written contract with the plaintiff wherein and whereby the plaintiff agreed "to furnish and set in position in a neat and workmanlike manner ready for use in the building referred to . . . the Improved Smead Heating and Ventilating Apparatus as therein described, and to furnish a superintendent to superintend the setting of the apparatus, and to give all instructions necessary for the proper introduction of the Smead system of ventilation, and furnish plans and specifications showing the proper construction of said building for warming and ventilating with said apparatus, without charge," and "to furnish all necessary registers, register frames, register faces, ventilating iron base, and valve regulators required in the execution of this contract. Apparatus is guaranteed to burn soft coal or wood and is to be set as per plans furnished by" plaintiff, "together with all necessary connections, and all work shall be done in a thoroughly neat and workmanlike manner to the satisfaction of" the defendants. It was also understood and agreed therein that said apparatus should be set and all work done by plaintiff promptly and without delay to the defendants or other contractors on the building, and that the apparatus might be set at any time between the laying of the foundation walls and the completion of the building. The plaintiff therein and thereby guaranteed "that said apparatus shall with good care warm the rooms of said building, in accordance with plans submitted and made a part of this contract, to an average temperature of seventy degrees Fahrenheit during the coldest weather and at the same time secure good ventilation in all the rooms warmed." The plaintiff "will also furnish registers for corridors, but does not guarantee warming of corridors to seventy degrees provided corridors are more than one story high. Provided the said apparatus does not fulfil the above guaranty," the plaintiff, "*upon being notified of the fact,* agrees either to *make it do so* at their

own expense by furnishing additional apparatus, or by making such changes and alterations as may be necessary, *or to refund all money paid them and remove the apparatus from the building.*"

The defendants agreed "to follow the plans, specifications, and instructions given by" the plaintiff "concerning construction of said building for warming and ventilation and for using the apparatus—a copy of instructions will be furnished with the apparatus,—do all mason and carpenter work and furnish all material for the same necessary to properly set the said heating apparatus, and pay the" plaintiff $3,500 as follows: $1,000 when the furnaces are delivered at high school building, $1,800 when furnaces are set in position in the basement, and $700 April 1, 1903. A note or school order was to be given to the plaintiff for the last-named amount when the furnaces were set in position in basement, and all payments were to be subject to draft when the same should become due, and all sums to draw interest at six per cent. after due until paid. The plaintiff was not to be held responsible for delays caused by other contractors on the building, and no verbal contracts were to be binding.

It is conceded that when the furnaces were delivered at the high school building the defendants paid to the plaintiff the $1,000 called for by the contract, and that when the furnaces were set in position in the basement the defendants paid to the plaintiff the $1,800 called for in the contract. It is also conceded that the high school building was completed on or about September 20, 1902, and about the same time the public school for the year was commenced. The defendants declined to pay the $700 which by the terms of the contract became due and payable April 1, 1903, on the ground that the apparatus had failed to heat the building as required by the contract. The plaintiff continued to try to make the apparatus work according to the contract during the school year of 1903–1904. Early in May, 1904, the defendants notified the plaintiff that

the heating and ventilating plant was not satisfactory and failed to fulfil the contract. Thereupon the plaintiff notified the defendants that it claimed that the plant would warm the building in all kinds of weather as agreed in the contract. The defendants then notified the plaintiff that they would withhold payment by reason of the plaintiff's failure to perform the contract, and thereupon the defendants requested the plaintiff to take the apparatus out of the building and pay back the money which had been so advanced.

On July 13, 1904, the plaintiff filed its claim for the $700 with the defendants, and July 19, 1904, same was disallowed by the defendants. On September 22, 1904, the plaintiff appealed from such disallowance to the circuit court. On January 9, 1905, the plaintiff served its verified complaint to recover said balance of $700, less $55 to be deducted by reason of certain changes in the apparatus, and demanded judgment for $645, with interest thereon at six per cent. from April 1, 1903. The defendants answered by way of admissions, denials, and counter allegations to the effect that the defendants, relying upon the warranties, guaranties, and promises contained in the contract, had paid the $2,800, and that the defendants had notified plaintiff of such failures to make the apparatus heat the building as required by the contract; and also by way of counterclaim alleged similar facts, and the expense and damages sustained by the defendants by reason of such failure of the plaintiff to perform such contract, and demanded that the complaint be dismissed on the merits and that the defendants recover back said $2,800 and interest and certain damages and interest. The plaintiff demurred to the counterclaim, and the same was overruled by the court. Thereupon the plaintiff replied and put in issue the respective counterclaims.

At the close of the trial the jury returned a verdict to the effect that they found for the defendants that the plaintiff had no cause of action, and they further found for the defendants

on their counterclaims, and assessed their damages at $2,800 and interest thereon from June 23, 1904, and for the further sum of $75 and interest thereon from September 1, 1905, amounting in all to $3,088.57. From the judgment entered thereon for the amount stated, with costs taxed at $511.88, the plaintiff appeals.

For the appellant there was a brief by *McElroy, Eschweiler & Wetzler,* and oral argument by *F. C. Eschweiler.*

For the respondents there was a brief by *Geo. B. Heaney,* attorney, and *John J. Wood* and *B. R. Goggins,* of counsel, and oral argument by *Mr. Goggins.*

The following opinion was filed January 29, 1904:

CASSODAY, C. J. 1. Errors are assigned because the court refused to direct a verdict in favor of the plaintiff and refused to set aside the verdict and grant a new trial, and ordered judgment on the verdict in favor of the defendants and against the plaintiff. In other words, the claim is that the verdict is not sustained by the evidence. The substance of the contract is given in the foregoing statement. By the terms of that contract the plaintiff agreed that with good care the apparatus would warm the rooms of the building to an average temperature of seventy degrees during the coldest weather and at the same time secure good ventilation in all the rooms warmed, and that if the apparatus did not fill the above guaranty the plaintiff, "upon being notified of the fact," would "either make it do so" at its own expense or "refund all money paid" to the plaintiff "and remove the apparatus from the building." The finding of the jury is to the effect that the apparatus did not fulfil such guaranty, and that the plaintiff, upon being notified of the fact, failed to make it do so or to refund the money which had been paid and remove the apparatus from the building. Whether such finding is sustained by the evidence is the important question in the case upon the merits.

Undoubtedly the plaintiff, "upon being notified of the

fact" that the apparatus did not fill the above guaranty, had the option either to make it do so "or to refund all money paid" and "remove the apparatus from the building." The contract does not name a specific time within which the plaintiff would make the apparatus perform, as required by the contract, or pay back the money and remove the apparatus from the building; but the law undoubtedly required it to be done within a reasonable time. Until that time expired, or the option exercised, the matter was to be determined by the plaintiff. Counsel contends "that every time any request or suggestion was made by the defendants with reference to this apparatus the plaintiff immediately sent representatives to *Berlin* to remedy any defect there might be." But the contract required the plaintiff, upon being so notified, either to make the apparatus so fulfil the guaranty or refund the money and remove the apparatus from the building. Upon being so notified of the fact of failure the plaintiff was bound by the contract to do the one thing or the other. That obligation was not discharged by sending "representatives to *Berlin* to remedy any defect" complained of. As stated, the school building was completed and ready for use September 20, 1902. The first test of the capacity of the apparatus for heating the rooms of the building came with the cold weather of that autumn. The evidence bearing upon such notification and the capacity of the apparatus to heat the rooms in cold weather is voluminous and cannot here be fully given in detail. Some of it is in writing and speaks for itself; but only the substance can be stated here.

As early as October 11, 1902, the plaintiff was notified by the defendants by letter that the furnace did not work as it should. Two days afterwards the plaintiff wrote asking information as to whether the difficulty was with the engine, or the apparatus that controlled the temperature, or the furnaces proper, as each line of work would require the sending of a different man. October 15, 1902, the defendants replied that,

when the clinkers were scraped out, the places would not open to let them fall through; that some rooms ran to seventy-five degrees, while other rooms ran from forty-eight to fifty degrees and could not be heated. The next day the plaintiff wrote, thanking the defendants for such information and giving certain instructions until the plaintiff's man arrived to fix it, and stating that the apparatus could be adjusted so that all the rooms could be shut off when the temperature reached seventy degrees. November 21, 1902, the defendants again wrote the plaintiff that they were having a lot of trouble in getting the rooms heated and explaining the trouble—that some of the rooms were cold a great share of the time, while others reached eighty degrees; that the engine would run very fast and then very slow. December 5, 1902, the defendants again wrote the plaintiff that there was no use talking, that the plaintiff must come to *Berlin* and straighten up the furnace and engine; that they had already burned fifty tons of coal and the winter had scarcely begun, and they could not stand for any more fooling. The next day the plaintiff replied that it did not blame the defendants for feeling as they did in reference to the engine; that the writer became thoroughly disgusted with it himself; that somebody would be there to fix it the next Monday. December 8, 1902, the defendants telegraphed the plaintiff: "Furnace won't heat. You must come."

The oral evidence tends to prove that at that time no part of the plant seemed to be doing its work, that there was a failure to get the required amount of heat, and that it was too cold to keep school. Owing to the fact that a local paper blamed the janitor for the failure to heat the building, the defendants, under date of December 9, 1902, wrote the plaintiff as to whether it considered the janitor to blame, and the next day the plaintiff replied to the effect that it seemed impossible that any person knowing the facts could have "made any such statement to anybody in reference to that

plant;" and further stating that there were a few things necessary to be done in order to get that plant working just as it should work—that it might "be ten days or two weeks before" they could be done, as the plaintiff was very busy. Under date of February 16, 1903, the plaintiff was informed by letter that there was inability to heat the building that morning; that at 8 o'clock a. m. the thermometer was eight or ten degrees below zero outside and only from fifty to sixty degrees above zero in the several rooms of the building, with the high school room the coldest; that by recess the thermometer had not gone up a degree and some of the rooms had actually gone down, so that it became necessary to send the scholars from the high school room home until noon; that at 11:30 there was not a room in the building over sixty-four degrees, with the big room at fifty-four degrees. February 18, 1903, the defendants sent this telegram to the plaintiff: "By order of board of education you are notified that heating plant installed by you in school building here does not fill guaranty in your contract. You are notified to do so or to remove plant." On the same day the defendants sent to the plaintiff a formal letter, reciting the essential terms of the contract, and requiring the plaintiff to forthwith perform the contract or return the money and remove the apparatus from the building. On the next day the plaintiff answered, refusing to pay for the telegram on the ground that it was unnecessary, and explaining why a man had not reached *Berlin* the week before, and stating that there was no reason why the plant should not work all right if in proper condition and properly handled, and regretting that the defendants had been annoyed to the extent mentioned, but assuring them that the plaintiff would do everything within its power to arrange matters so that the janitor would handle the plant in a manner to make it work satisfactorily to everybody.

Under date of February 21, 1903, the plaintiff wrote the defendants, among other things, that "we are going to continue

working at that plant until we learn where the trouble lies and remedy the defect at our expense," and that the plaintiff's man at *Berlin* had written that he thought he had found the difficulty and was going to remain until he had remedied it. Under date of March 26, 1903, the plaintiff wrote the defendants that it had caused to be shipped to the defendants a new gasoline engine and would send a man to set it up, and hoped and thought it would be the last of the defendants' troubles in connection with the heating plant in that building. April 2, 1903, the defendants wrote the plaintiff that the engine had arrived and requested that it be set at once, and suggested that the payment of the balance of the contract price be deferred until the next winter, after the plant had been thoroughly tested; and the next day the plaintiff replied that to hold payment until the next winter would be perfectly satisfactory.

As the weather grew cold in the fall of 1903, trouble with the apparatus was renewed. As early as November 4, 1903, the defendants wrote to the plaintiff complaining about the working of the new engine. On January 4, 1904, the defendants telegraphed the plaintiff: "School closed. No heat." The receipt of that telegram was acknowledged by the plaintiff by telegram on the same day and also by letter to the effect that the plaintiff was in doubt whether to send to *Berlin* a heating man, a regulating man, or an engine man—any one or all might be needed,—and promising to send men soon, and asking for information, and stating that the building ought to have been heated readily that morning. On the next day the defendants wrote the plaintiff to the effect that the engine man had been there and fixed the engine and left repairs for it; that the engine and fan worked, but that the heating plant, as theretofore, had proved a failure; that for two weeks carpenters had been fixing the ceiling of the main room and kept up fires during the time; that the Sunday before they kept fires all day and left a good fire at night, and started the fires anew at 4 o'clock on Monday morning; that some of

the water pipes burst, and it was 12 o'clock before they got the heat up to forty degrees, and at school time in the afternoon could only get it up to fifty-one or fifty-two degrees, and closed by stating what the defendants had stated before, that "this plant will never heat that building, and the sooner" the plaintiff made up its mind "that this is so the better it will be for the *Berlin* school board, as the citizens of *Berlin*" were "about ready to take matters into their own hands." Under date of January 22, 1904, the plaintiff wrote the defendants, giving an excuse for not answering before, and thanking them and requesting more particular information thereafter, and stating that "eventually" the plaintiff would "get that plant to working nicely"—that the plaintiff was "going to fulfil" its contract.

Under date of March 9, 1904, the defendants wrote the plaintiff that the school board had decided that the heating plant was not satisfactory and did not comply with the contract. March 21, 1904, the board voted to notify the plaintiff that it had failed to fulfil the contract for heating and ventilating the high school building, and the next day the defendants wrote to the plaintiff to that effect. Under date of April 2, 1904, the plaintiff wrote the defendants, giving absence as a reason for not answering sooner, and asking in what respect the plaintiff had failed to perform its contract with the defendants. May 6, 1904, the plaintiff by letter offered to give to the defendants a "guaranty or bond made by the Milwaukee Trust Company . . . to the amount of $3,500 as a guaranty that all the guaranties and agreements" in the contract would be fulfilled, on condition that the defendants pay the balance due on the contract, and stating that the plaintiff knew positively that the plant would warm the building in all kinds of weather. May 10, 1904, the board voted to withhold further payment until in their opinion the plant proved satisfactory, and May 13, 1904, the defendants wrote the plaintiff to that effect. May 14, 1904, the plaintiff asked how long the de-

fendants wanted to run the plant before making final payment. June 2, 1904, a resolution was adopted by the board of education requiring and directing the plaintiff to forthwith remove the apparatus from the high school building and refund and repay into the school fund of the city the $2,800, all of which was thereby demanded; and a certified copy thereof was June 23, 1904, served upon the plaintiff, who thereupon acknowledged the receipt thereof, and stated in the letter that the plaintiff had never had the name of not fulfilling its contracts, but that it was satisfied that its contract with the defendants had been fulfilled.

July 13, 1904, this action was commenced by the plaintiff filing its claim with the board of education, which claim the board disallowed July 19, 1904, and from such disallowance the plaintiff appealed to the circuit court September 22, 1904.

The correspondence, of which a general outline is thus given, shows the attitude of the respective parties from October 11, 1902, to June 23, 1904, as to the failure of the apparatus to heat the rooms of the building as agreed in the contract. From such correspondence it conclusively appears that the defendants repeatedly "notified" the plaintiff "of the fact," if it be a fact, that the apparatus did not fulfil the guaranty contained in the contract. The oral testimony as to whether such apparatus fulfilled such guaranty is voluminous. After careful consideration we are constrained to hold that the evidence in the record is sufficient to sustain the verdict. As indicated in the brief of counsel for the plaintiff, the complaints of such failures to warm the rooms of the building were generally followed by promises on the part of the plaintiff to send men to remedy the defects, which they attempted to perform. Such complaints on the part of the defendants and attempts to perform on the part of the plaintiff had continued during two winters and covered a period of about a year and a half. Certainly the plaintiff was given all the time it could reasonably ask to make the apparatus perform accord-

ing to the contract. It had agreed that "upon being notified" that the apparatus did not, with good care, warm all the rooms of the building "to an average temperature of seventy degrees during the coldest weather and at the same time secure good ventilation," then it would either make it do so at its own expense or "refund all money paid . . . and remove the apparatus from the building." If there was such failure to perform as claimed by the defendants, then the agreement called for effective action on the part of the plaintiff.

Counsel contends that, because the defendants after June 23, 1904, continued to use the entire system furnished by the plaintiff, they thereby exercised absolute and unqualified ownership of the same, and hence that the defendants cannot maintain their counterclaim based upon the clause of the contract mentioned. We cannot hold that such use under the circumstances mentioned constituted an acceptance of the apparatus. *Fuller-Warren Co. v. Shurts,* 95 Wis. 606, 70 N. W. 683; *Williams v. Thrall,* 101 Wis. 337, 76 N. W. 599; *Madison v. Am. S. E. Co.* 118 Wis. 480, 507, 95 N. W. 1097; *Manitowoc S. B. Works v. Manitowoc G. Co.* 120 Wis. 1, 6–8, 97 N. W. 515. If the plaintiff failed to perform, as found by the jury, then, under the contract, it was the duty of the plaintiff to "remove the apparatus from the building." Such use on the part of the defendants, in consequence of such failure of duty on the part of the plaintiff, cannot be regarded as an acceptance of the apparatus.

2. Twenty-nine errors are assigned, all relating to the admission or exclusion of testimony. They are promiscuously arranged and often repeated. The view taken of the contract and the rights of the parties under it, as above expressed, obviates the necessity of any specific expression in regard to several of such alleged errors thus presented. Of course, all letters and testimony having a legitimate bearing upon any of the questions at issue were admissible, and all irrelevant testimony was properly excluded. It has been said by a court of

high authority that when the errors assigned are very numerous it is practically necessary to consider but few of them. *Grayson v. Lynch,* 163 U. S. 468, 16 Sup. Ct. 1064; *Olwell v. Skobis,* 126 Wis. 308, 315, 105 N. W. 777. We have, however, examined all of them, but several are not of sufficient importance to be specifically mentioned.

3. The rights of the parties must be determined as of June 23, 1904, when the plaintiff was notified to remove the apparatus from the building. That was in summer, when the heating capacity of the apparatus could not be tested. Of course, the operation of the plant prior to that time, and its heating capacity, were legitimate subjects of inquiry. Exception is taken to the admission of testimony as to the operation of the plant subsequently to January 12, 1905, on the sole ground that at that time the defendants had absolutely accepted the apparatus. There was no claim that there had been any change in the capacity or efficiency of the apparatus subsequently to June 2, 1904. Under such circumstances we perceive no reason why evidence of the operation of the plant during the winter of 1904–1905 was not admissible. The conditions were substantially the same as during the two previous winters and seem to have been so regarded by both parties. The defendants at no time refused to allow the plaintiff to inspect the plant.

4. Error is assigned because the court admitted testimony as to the heating of the corridors of the building. The claim is that, although the contract required the plaintiff to "furnish registers for corridors," yet it did "not guarantee warming of corridors to seventy degrees, provided corridors are more than one story high," and that, as the corridors were more than one story high, no heat therefor was required to be furnished. The trial court construed that clause of the contract differently, and so charged the jury that under the contract "the corridors . . . were not to be heated to seventy degrees." No exception was taken to such charge, and we

perceive no error in admitting such testimony. It clearly implies that the corridors were to be heated to some extent.

5. Errors are assigned in admitting testimony to the effect that since and including August 16, 1901, when the contract was made, meetings of the school board were held pursuant to and as required by a rule of the board which declares that "the regular meetings of the board shall be held on the first Thursday evening of each month" at the times and places therein named, and that "special meetings of the board may be called by the superintendent at his discretion or at the request of any two members," and that four commissioners present should constitute a quorum. The minutes of the board in evidence affirmatively show that the meetings in question were so held, and in the absence of evidence to the contrary the presumption is conclusive that such meetings were so called and held. 20 Am. & Eng. Ency. of Law (2d ed.) 1212; *Kavanaugh v. Wausau,* 120 Wis. 611, 614, 615, 98 N. W. 550; *Wright v. Forrestal,* 65 Wis. 341, 350, 27 N. W. 52.

6. Error is assigned because in the taxation of costs the clerk of the trial court allowed witness fees for the attendance of witnesses at the June, 1905, term of the circuit court for Green Lake county, $59.40, which taxation was in all things and as to all items therein affirmed by the trial court, with $10 costs of motion. It appears that the cause was not tried at that term of the court, but the venue was then changed to Waukesha county. Of course, costs are purely statutory. The statute provides that "costs shall be allowed of course to the defendant . . . unless the plaintiff be entitled to costs," and "all the necessary disbursements and fees of officers allowed by law." Secs. 2920, 2921, Stats. (1898). This includes witness fees. *Keith Bros. & Co. v. Stiles,* 92 Wis. 15, 64 N. W. 860, 65 N. W. 860. Counsel for the plaintiff contends that under the statute, upon a change of venue, costs are only permitted after a continuance has been had by the party mak-

ing the application, and that even then no witness fees are to be included if notice of the application and a copy of the affidavit upon which it is based are served upon the opposite party ten days before the commencement of the term. Sec. 2625, Stats. (1898). The difficulty with the contention is that the provision of the statute thus referred to is applicable only to a party who had obtained a continuance in the action prior to making such application, whereas in the case at bar no continuance had previously been obtained by either party. The defendants, having prevailed on the trial, are entitled to full costs and disbursements. We find no reversible error in the record.

By the Court.—The judgment of the circuit court is affirmed.

TIMLIN, J., took no part.

A motion for a rehearing was denied April 9, 1907.

SCHULTZ, Administrator, Respondent, vs. BECKER, Appellant.

December 8, 1906—April 9, 1907.

Gifts* mortis causa: *Administrator: Conversion of personal property.

1. **To be valid, a gift *mortis causa* must take effect during the life of the donor as an executed and complete transfer of the possession and title, either legal or equitable, to the donee.**
2. **In an action by an administrator for a wrongful conversion of household goods of his decedent, it is *held* upon the evidence that it was a question for the jury whether defendant had refused to allow plaintiff to take possession of the property.**

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

It appears from the record that Mary Becker died intes-

tate June 18, 1905. On September 27, 1905, the plaintiff was duly appointed administrator of her estate. After a demand upon the defendant by the plaintiff for the property hereinafter mentioned, and refusal, as alleged, of the defendant to deliver the same, on January 18, 1906, the plaintiff commenced this action against the defendant to recover the value of certain household furniture—clothing and bedding described—the property of the said Mary Becker at the time of her death and alleged to be of the value of $300, and also to recover the value of six certificates of deposit described, the property of the said Mary Becker at the time of her death, of the alleged aggregate value of $1,200. The defendant answered by way of admissions to the effect that June 18, 1905, Mary Becker was and for some time prior thereto had been in the possession and the owner of the personal property mentioned of the value of $1,200; that she died intestate on the day named; that the plaintiff is the administrator of her estate, and that he had qualified as required by law; and that the plaintiff had made demand of some personal property supposed to be the same property referred to in the complaint, but, save as thus expressly admitted, the answer denies each and every allegation of the complaint.

It appears in the record, among other things, in effect, that the deceased, Mary Becker, was seventy-nine years of age at the time of her death. She was the widow of Fred Becker, who died in 1892. She had been his wife for thirty-four years before he died. Fred had been married before and had two sons by his first wife, and the defendant was one of them. About ten years after Fred married Mary Becker the defendant married and left home. In 1882, at the request of his father, the defendant with his family went back and took charge of his father's farm and cared for him and his stepmother until his father died, and from that time on until Mary died she continued to live as before in her own separate part of the same farmhouse occupied by the defendant. Mary's husband had made provision for her comfortable sup-

port, whereby she was not only to have such separate home and half an acre for a garden, but the defendant and his brother were each to pay her $100 a year in cash and furnish her with a certain quantity of wood and provisions each year. Mary owned everything in her part of the house and ran the same and the garden herself and attended to her own business, except such assistance as she got from her sister and a Mr. Wolf. Mary had no blood relatives except a sister and her two daughters, Lena and Lizzie Schultz, who lived about half a mile from where Mary did.

On Saturday, June 17, 1905, Mary was very sick and was visited by the doctor on the afternoon of that day. Her niece, Lena Schultz, and the defendant's wife sat up with her all that Saturday night. Between 7 and 8 o'clock the next morning the doctor again attended her. About that time the defendant sent his boy for one A. L., who lived about a mile distant. A. L. came between 8 and 9 o'clock and asked the defendant in the presence of Lena Schultz and his wife and another lady what he wanted of him. The defendant replied, some kind of a writing disposing of Mary's property, and that he, A. L., knew best what to write. A. L. then said there was nothing he could do except to make a will—write Mary's wishes on paper. The defendant then said Mary did not want any will, but wanted a memorandum, which A. L. told him would be worthless and advised against it. A. L. could not understand Mary, who was German, but communicated with her through the defendant's wife, which finally resulted in his making the following written memoranda:

Exhibit 1, covering a large number of items in the house to various persons.

Exhibit 2:

"I, Maria Becker, of the town of Greenville, county of Outagamie, state of Wisconsin, do make it known that by and with my order I give to *Henry Becker, Sr.*, all monies now deposited in the First National Bank of Appleton, amounting to twelve hundred ($1,200) dollars, providing my death oc-

curs at this time, and I further order that the sum of three hundred ($300) dollars shall be taken from the above amount of twelve hundred ($1,200) dollars and be used if necessary to pay the cost of the funeral and monumental expenses. It has been my expressed wish and do express it now that no will or testament be written or made. In conveying my personal property to the said *Henry Becker, Sr.,* I do declare and order that the above written order shall be in full force immediately after my death. In witness whereof I have set my hand and seal this 18th day of June, 1905.

her
"MARIA × BECKER. [Seal.]
mark.

"A. Lockschmidt, Witness.
"Lydia Schottler, Witness."

Exhibit 3:

"$1200. June 17th, 1905.

"One year after date I promise to pay to the order of Mary Becker Twelve Hundred Dollars at the First National of Appleton.

"Value received with interest at 2½ per cent. per annum.

"This note is of no value after the death of Mary Becker.

his
"HENRY × BECKER."
mark.

her
"ERNESTINE × BECKER."
mark.

Soon after, and about 1 o'clock in the afternoon of that same Sunday, June 18, 1905, Mary died.

At the close of the testimony the plaintiff's counsel moved the court for the direction of a verdict in favor of the plaintiff, and, the court having stated that such "motion to direct a verdict must be granted," counsel for the defendant thereupon stated "that the defendant disclaims, and has always disclaimed, any right, title, or interest in the household goods, and makes his claim solely as to the certificates of deposit amounting to $1,200, and for which the note, Exhibit 3, was given, and the defendant asks of the court that the questions as to the transfer and delivery of the certificates of deposit

and all other questions involved in that transaction be submitted to the jury." To that request the court stated:

"As to that point the court holds that the undisputed evidence shows that all the property involved in this action passed into the possession of the defendant and has remained in his possession down to the present time."

The defendant duly excepted to such ruling of the court. The court then stated that "under the decision of the court the gift *causa mortis* fails as to all of that property. The uncontradicted evidence shows that the property is, and has been ever since the death of the donor, in the possession of the defendant, and he must account for it. So far as the evidence shows, nobody has made any claim to it except the administrator; there is no disclaimer here in the pleadings or anywhere else that I know of except the mere verbal disclaimer on the trial." Counsel for the defendant excepted to such ruling of the court as contrary to the evidence and that it was a question for the jury and not for the court. The defendant then asked the privilege of showing that the household goods did not exceed in value $100, to which the plaintiff objected on the ground that the plaintiff's witnesses were not present; "and thereupon the court directed the jury to find and return a verdict in favor of the plaintiff and against the defendant in the sum of $1,500 damages, and the jury accordingly found, rendered, and returned into court such verdict as so directed." From the judgment entered upon that verdict in favor of the plaintiff and against the defendant for the amount stated with costs, the defendant appeals.

For the appellant there was a brief by *Pierce & Lehr,* and oral argument by *J. E. Lehr.*

For the respondent the cause was submitted on the brief of *Thomas H. Ryan* and *Albert H. Krugmeier.*

The following opinion was filed January 8, 1907:

CASSODAY, C. J. 1. There is no claim nor pretense that the written memoranda set forth in the foregoing statement

constituted a last will and testament of the deceased. On the contrary, the answer expressly "admits that said Mary Becker died intestate." The memorandum itself, Exhibit No. 2, declares it to be the "expressed wish," therein repeated, "that no will or testament be written or made." No attempt was made to prove it as a will. The claim is that there was a complete transfer and delivery of the certificates of deposit in the lifetime of the deceased. Assuming that the memorandum relied upon truly expressed the wish of the deceased, yet it was a mere order to give to the defendant all moneys then on deposit in the bank, providing her death occurred at that time, and even then it was therein ordered that a certain amount thereof should be used as therein stated, and then declared that, in conveying her personal property to defendant, she thereby ordered "that the above written order *shall be in full force immediately after my death.*" In other words, the proposed gift was purely testamentary, and only to take effect after her death and not *in præsenti.* The case which seems to be nearest the case at bar in its facts is *Basket v. Hassell,* 107 U. S. 602, 609, 610, 2 Sup. Ct. 415, where Mr. Justice MATTHEWS carefully reviewed and analyzed the adjudications, English and American, and reached the conclusion, and the court held, that

"A *donatio mortis causa* must, during the life of the donor, take effect as an executed and complete transfer of his possession of the thing and his title thereto, although the right of the donee is subject to be divested by the actual revocation of the donor, or by his surviving the apprehended peril, or by his outliving the donee, or by the insufficiency of his estate to pay his debts. If by the terms and condition of the gift it is to take effect *only* upon the death of the donor, it is not such a *donatio,* but is available, if at all, as a testamentary disposition."

That was an attempted gift of a certificate of deposit whereby the payee, during his last sickness and in the apprehension of death, made and signed the "following indorse-

ment" upon such certificate: "Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself;" and then delivered it to the proposed donee and died. It was held that "by such indorsement and delivery" the donee "acquired no title to, or interest in, the fund." In the opinion of the learned justice it is said "that a *donatio mortis causa* must be completely executed *precisely as required* in the case of gifts *inter vivos,* subject to be divested by the happening of any of the conditions subsequent" above mentioned. "These conditions are the only qualifications that distinguish gifts *mortis causa* and *inter vivos.* On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of *possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will.*" That adjudication has repeatedly been referred to approvingly by this court. *Barker v. Buhre,* 61 Wis. 487, 489, 21 N. W. 613; *Henschel v. Maurer,* 69 Wis. 576, 34 N. W. 926; *Crook v. First Nat. Bank,* 83 Wis. 31, 36, 37, 52 N. W. 1131; *Opitz v. Karel,* 118 Wis. 527, 530, 531, 95 N. W. 948. As indicated in the case at bar, the order written in the memorandum was only to be in force after the death of Mrs. Becker and not *in præsenti.* Pursuant to that theory the scrivener wrote the indorsement and put the mark on one of the certificates the day after Mrs. Becker died. That certificate was absent at the time he wrote the indorsement on the other certificates. Manifestly the ruling of the trial court to the effect that the document which governed in the case showed that the transaction was not a valid gift *causa mortis* was correct. For similar reasons there was no gift *inter vivos,* much less a purchase of any of the property in controversy by the defendant. The conversion of the certificates of deposit and the refusal to deliver the same to the plaintiff or his attorney seems to be conceded.

2. As to the other personal property, the plaintiff testified to the effect that when the demand was made for the same by him the defendant said it was there in the house, but that Mrs. Becker had given it all away. The defendant testified to the effect that when the plaintiff demanded the household goods he told him they were not given to him and he was not holding them, and that if he wanted them he should take them; that he, the defendant, never made any claim to such household goods, and that he never refused to let the plaintiff, or anybody else, have those goods.

At the close of the testimony, and after the court had intimated an opinion against the defendant, his counsel disclaimed and asserted that he had always disclaimed any right, title, or interest in the household goods. The court held, however, that such goods passed into the possession of the defendant and remained there down to the time of the trial and that he must account for them. The defendant excepted to such ruling and claimed that the question was for the jury and not for the court. The court directed a verdict in favor of the plaintiff and against the defendant for $1,500, which included $300 as the value of such household goods. We perceive no ground upon which such ruling can be sustained. The goods apparently remained in the same portion of the house which had been occupied by Mrs. Becker. The defendant was under no obligation to remove them to the plaintiff's premises. Under the evidence referred to, it was at least a question for the jury as to whether the defendant refused to allow the plaintiff to take away such household goods, and, if so, their value. By reason of such error the judgment cannot be affirmed.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

TIMLIN, J., took no part.

A motion for a rehearing was denied April 9, 1907.

McKone, Respondent, vs. Metropolitan Life Insurance Company, Appellant.

January 11—April 9, 1907.

Principal and agent: Compensation: Slight excess in recovery: Contracts: Agent's liability for losses through fraud of subagents: Negligence: Special verdict: Instructions to jury: Expert testimony: Consideration for promise to pay: Payment by promisee of his own debts.

1. Evidence tending to show, among other things, employment of plaintiff, or continuation of his employment, for a week after his formal dismissal as agent of defendant, is *held* sufficient to sustain a recovery of salary for that week.
2. An alleged excess of $1.54 in a verdict awarding $134.03 for services, commissions, etc., might well be referred to the rule *de minimis non curat lex.*
3. Contracts under which plaintiff became a district superintendent in defendant's Industrial Department and an agent in its Ordinary Department (providing, among other things, that it should be his duty as such superintendent to nominate agents for appointment by defendant, to instruct such agents, and to see that all agents under his charge made the proper remittances to the home office, and that he should obey and abide by all rules contained in a manual of instructions which declared, among other things, that "each superintendent is personally responsible for moneys received by himself and by his assistants and clerks") are construed to be contracts of employment and not to make plaintiff a guarantor of the defendant against losses in the district from the frauds or defalcations of an assistant superintendent in a detached section of such district with whose nomination or appointment plaintiff had nothing to do and who, in the matter of reports and remittances, dealt directly with the defendant.
4. Refusal to submit in a special verdict a question as to whether defendant would have suffered any loss if plaintiff had not been guilty of negligence, was rendered immaterial by answers to other questions to the effect that plaintiff was not negligent.
5. Requested instructions as to the liability of an agent to his principal for negligence or omission of duty are *held* to have been fairly covered by an instruction that the agent was bound to exercise reasonable diligence and such skill as is ordinarily possessed by persons of common capacity engaged in the same business or occupation, and that it was for the jury to deter-

mine whether or not, in the particular case, the agent failed to exercise such diligence and such skill.

6. A statement by the trial judge, in submitting questions for a special verdict in an action at law, that they are submitted for the purpose of aiding him to better determine what the final judgment in the case should be, is *held* not to inform the jury that their verdict would be merely advisory.

7. The issue being as to the liability of a district superintendent for losses sustained by an insurance company through fraud of an agent in the district, an insurance inspector was asked whether the fraud would have been possible if collection books had been properly kept by each agent and had been examined and their condition known and reported to the company by the superintendent; and was also asked what such inspection and report would have shown as to the condition of the business. *Held*, that objections were properly sustained on the ground that the questions called for inferences of fact not the subject of expert knowledge and which it was the province of the jury to draw.

8. An instruction to the effect that the jury should find the plaintiff guilty of negligence if the evidence "satisfies" them that he failed to exercise reasonable diligence, etc., was not erroneous because of the use of the word "satisfies," it being apparent that it could not have been misunderstood by the jury.

9. Promises by a district superintendent to make good to the insurance company certain losses sustained by it through defalcations of an agent for which the superintendent supposed himself legally responsible, when in fact he was in no way responsible therefor, were without consideration and void, where they were not made by way of compromise or adjustment of any claim of liability; and the fact that at the request of the superintendent, made in connection with such promises, the company paid its own debts or performed its own obligations to third persons, did not constitute a sufficient consideration for the promises.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

This is an appeal from the judgment of the circuit court for Rock county upon the verdict of a jury supplemented by findings of the court authorized by stipulation of parties. The action was begun in justice's court, and upon appeal to the circuit court the defendant pleaded a counterclaim containing

eighteen items aggregating $2,715.69. Based on the verdict of the jury in his favor the plaintiff recovered $134.03, which was reduced to $121.79 by offsetting against it the eighteenth item of defendant's counterclaim, allowed by the court in its findings at $12.24, and judgment was rendered in favor of the plaintiff for $121.79 and costs.

The complaint averred that on June 5, 1899, the plaintiff entered the service of the defendant as agent, for which service he was to receive $25 per week; that he performed and that he had been paid for all except the week ending January 16, 1904, for which there was due him from the defendant $25; and then averred claims for other items of commission earned and moneys paid to the use of defendant, in all aggregating $177.37.

The amended answer admitted services by the plaintiff up to January 9, 1904, and pleaded payment of all claims of the plaintiff. The counterclaim averred that plaintiff entered the employment of defendant as general superintendent of the Janesville district, including Janesville, Beloit, Madison, Watertown, and Portage, and that on the recommendation and advice of the plaintiff Otmar W. Andres was appointed assistant superintendent of the detached section of said district in the city of Madison, and entered upon the performance of his duties; "that by virtue of the contracts, agreements, instruction books constituting the contract between the plaintiff and defendant the plaintiff became responsible for the faithful performance of all duties on the part of said assistant superintendents." The duties are then specified to be (1) to obey all orders, carry out all instructions, etc.; (2) to see to it that each of the assistants performs his duties in a diligent, skilful, and faithful manner; (3) "that the plaintiff by virtue of his employment as general superintendent became responsible for all moneys received by himself or his assistants and clerks for said defendant or from said defendant." Then follow items of the counterclaim which may be classed as re-

lating (1) to plaintiff's account in arrears; (2) to premiums collected and converted to his own use by Andres; (3) to moneys received from defendant upon fraudulent death claims made and presented by Andres; (4) valid death claims against the defendant, in which Andres received the money or draft for transmission to the beneficiary but converted the same to his own use; (5) a sum due from plaintiff for rebate on a credential book. In two of the instances arising under class 3 above it was averred also that the draft issued by the defendant in payment of the fraudulent claim was payable to the order of plaintiff and by him indorsed, and in the case of Elizabeth Smith, falling under class 4 above, and in items 1 and 2 of the counterclaim, falling under class 2 above, special promises of the plaintiff to make good the defendant's loss or repay the defendant were averred. By varying forms of expression it was averred that plaintiff committed these acts of conversion and fraud through Andres. The items of the counterclaim may be further classified as items relating to the Ordinary Department of defendant's business, which department, with some immaterial divergence, included policies from $500 upwards; and items relating to the Industrial Department of defendant's business, in which policies were issued in smaller amounts and premiums paid, collected, remitted, and reported on weekly. Of the items of the counterclaim consisting of premiums collected and converted by Andres three relate to the Ordinary Department of defendant's business, and with this exception, and with the exception of the first item for general balance due from plaintiff upon account, all the other disallowed items of the counterclaim relate to transactions in the Industrial Department. The plaintiff had no authority to employ or discharge Andres, and, although he might nominate or select such assistants subject to defendant's approval, he did not do so in the case of Andres.

Upon the special verdict of the jury finding as aforesaid, and finding that the plaintiff was not guilty of any negligence

in the matter of his supervision of the Madison district or in forwarding checks to Andres, and the findings of the court that the plaintiff had accounted for and paid over to the defendant all sums of money which came into his hands as agent or superintendent of the defendant, and that Andres was at no time the agent of the plaintiff, but was the agent of the defendant with whom the defendant corresponded, dealt, and treated directly in both the Industrial and Ordinary Departments, and that, except the claim for balance due on account above mentioned, all the shortages, defalcations, and procuring of money by forgeries occurred in the Madison office of said Andres, all the other items of the counterclaim were disallowed and judgment rendered as aforesaid.

Error is assigned upon the ruling of the court below compelling the defendant to elect at the commencement of the trial whether it would proceed in tort or upon contract in respect to its counterclaim; in the exclusion of evidence; in submitting to the jury the right of the plaintiff to recover the item of $25 wages; in refusing to submit to the jury whether or not the defendant would have suffered loss on account of the fraudulent death claims had not the plaintiff been guilty of negligence; in submitting to the jury questions relating to the negligence of plaintiff in the matter of supervision of the department; in refusing to give certain requested instructions to the jury; in charging the jury; in refusing to strike out three of the questions and answers of the special verdict; in refusing to make findings requested by defendant; in making the findings signed by the court, except the first and third findings; in not covering all the issues involved in the findings of fact; in submitting the question of the negligence of the plaintiff in forwarding two drafts to Andres; in not finding for the defendant on each item of the counterclaim submitted to the court, except items 4 and 18; and in not submitting to the jury, or himself finding on the proof submitted, the fact of loss to the company by forged and

fraudulent death claims; and in not finding as to the truth of each item set up in the counterclaim.

Wilson Lane and *William Smith,* for the appellant.

M. O. Mouat and *Edward H. Ryan,* attorneys, and *O. A. Oestreich,* of counsel, for the respondent.

The following opinion was filed January 29, 1907:

TIMLIN, J. There is considerable confusion in the record of this cause, some inconsistency and lack of clearness in the errors assigned, and a wide divergence between the facts pleaded in the counterclaim and the facts admitted or proven. The preliminary ruling of the court requiring the defendant to elect whether it would proceed in tort or upon contract seems to have had no injurious effect upon defendant's rights; for, notwithstanding this, the cause was tried with reference to the plaintiff's liability for negligence and with reference to his liability *ex contractu,* and these would seem to cover all possible grounds of liability suggested by the evidence. It is not contended that the plaintiff participated in the frauds or misappropriations committed by Andres. In submitting to the jury the right of the plaintiff to recover the item of $25 wages, some weight was no doubt given to the letter of the defendant discharging the plaintiff, which, after declaring, "You are hereby dismissed from the service of this company, to take effect January 9th," stated, "If you feel so disposed, you may remain with Mr. Mott during the week of January 11th, giving him such information as you may possess concerning the conduct of the district, and for that week we will pay you the equivalent of the weekly salary which you have heretofore been in receipt of." Evidence was given tending to show that the plaintiff accepted this employment, or continuation of employment, reported for and entered upon the discharge of his duties, but before the end of the week Mr. Mott refused to continue his services, and the plaintiff earned no money at any other employment during that week.

This evidence came in without objection under the complaint, and seems sufficient to sustain a recovery under such circumstances. *Forcy v. Leonard,* 63 Wis. 353, 24 N. W. 78, and cases cited. The claim of appellant that there is included in the amount of the jury's verdict an excess of $1.54 might well be referred to the rule *de minimis non curat lex;* but the appellant has not made it to appear that there is such excess included in the verdict, and error must be made to appear clearly and affirmatively.

Before considering the other assignments of error it will be convenient, for the purpose of grouping and considering together some of such assignments of error, to take up the contract relations between the parties. June 5, 1899, the plaintiff entered the employment of the defendant as "superintendent in the Industrial Department" under a written contract prescribing with considerable detail the duties of the plaintiff. Prominent among these duties was that of nominating to the company for appointment suitable agents for the Industrial Department and instructing such agents in the details of the work, the duty to obey orders and carry out the instructions of the company, to see that all agents under plaintiff's charge sent to the home office weekly a true account of all moneys received by them during the week and remitted for the same less their authorized deductions, to pay all charges for expenses of every kind incident to the carrying on of the defendant's business in his district, not to resign without at least seven days' notice to the defendant, and, in case of resignation or dismissal, to introduce to his successor all the assistants and agents in his district, to make no contracts except in accordance with the instructions from defendant's officers, etc. The contract also contained these words:

"I further agree that any advances or allowances made to agents or others under my charge shall be borne by me."

A salary of $25 a week, together with a contingent amount payable at the end of the year, was provided as compensation

for the plaintiff. On June 10, 1899, the plaintiff was appointed an agent of the defendant's Ordinary business, and in this contract he agreed to obey and abide by all the rules contained in the circular letter and manual of the defendant, and for these latter services as agent he received a commission on premiums collected. The manual of instructions which it is claimed was delivered to plaintiff some time after the execution of the contract of June 5, 1899, under the chapter thereof relating to superintendents' responsibility for collections, provided:

"Each superintendent is personally responsible for moneys received by himself and by his assistants and clerks. Superintendents must decide as to the advisability of requiring bonds from their assistants, clerks, and others."

The instruction book in the Ordinary Department provided that the defendant would deal only with the plaintiff as to applications received from his district, except where special arrangement is made with his detached assistants, if any. It also defined the word "canvasser" to mean all those employed by the plaintiff to solicit ordinary insurance, and provided that such persons would be the agents of the plaintiff and not the agents of the defendant in the Ordinary Department. Although plaintiff had nothing to do with the nomination or appointment of Andres, and although Andres in the matter of remittances and reports and receipts dealt directly with the defendant, yet the plaintiff did take a bond from Andres in the sum of $500, conditioned to make good and reimburse to the plaintiff such loss of money, securities, or other personal property belonging to the plaintiff or in plaintiff's possession, or for which the plaintiff might be liable, as might be sustained by the plaintiff by reason of the fraud or dishonesty of Andres occurring between June 15, 1903, and June 14, 1904. The plaintiff also to some degree exercised a supervision over the Madison office. But the counterclaim by introductory averments and with reference to all its items, "Or-

dinary" or "Industrial," designates the city of Madison as a detached section of the plaintiff's district, and the testimony of the witness E. E. Mott shows that remittances in the Industrial Department from a detached section are forwarded directly to the company, at least whenever desired by the superintendent of the district, and probably the majority of agents or assistants in detached districts conduct their business in that way. The business of the Madison office was in fact so carried on. The contract with the plaintiff, whether modified or interpreted by the manual of instructions or not, was in its essential features a contract of employment, and cannot be held to be an obligation to absolutely guarantee the defendant against losses in the superintendent's district, except so far as specifically provided in the contract. The contract obligations thereof relate to agents and assistants under the direct control of plaintiff, who collected for plaintiff and reported and remitted to him. No specific provision of this contract has been called to our attention which would make the plaintiff liable for the frauds or conversions of Andres or for the failure of Andres to remit to the defendant the moneys collected by Andres for premiums.

By the contract made by the defendant with Andres which bears date May 27, 1901, the latter has authority to nominate for appointment agents for the Industrial Department and to instruct them in the details of the work, and "to see that all agents under my charge send to the home office each week on the day required and on the forms provided by the company true accounts of all moneys received by them, and remit for the same as provided by their agreements." This seems to authorize Andres and those under his charge to report and remit directly to the home office. The plaintiff had no authority to employ or discharge Andres. The plaintiff might, therefore, well have some supervision as a superior employee of the defendant over Andres' office, and yet not be liable *ex contractu* for the frauds or defalcations of Andres. It was,

however, not improper to submit to the jury in the special verdict questions relating to the negligence of the plaintiff in the matter of supervision, and the questions submitted relating to this subject are amply sufficient to cover each department of the defendant's business.

The case standing in this way, the defendant assigns error upon the refusal of the court to submit the following question in the special verdict:

"Would defendant have suffered any loss on account of fraudulent death claims had not plaintiff been guilty of negligence in attending to his duty?"

The defendant requested the court to charge:

"That the plaintiff was charged with diligence and care in looking after and protecting the interests of the defendant at the Madison agency. He was superintendent of the district of which the Madison agency was a part. It was his duty to carefully inspect that office and the business originating therefrom, to institute any and all investigation which a prudent and careful man under the circumstances would have instituted. On receiving credible information that the business at the Madison agency was being conducted in an irregular or improper manner, it was his duty to place the defendant company in possession of such information and to have on his own initiative instituted a thorough investigation of the business of that office. If through the neglect of duties on the part of plaintiff the defendant met with loss, the plaintiff is liable to such loss; that is to say, if you shall find that, had the plaintiff performed the duties imposed upon him by the terms of his employment, no loss would have occurred to the defendant, or not so great a loss, then the plaintiff is liable for any loss the proof shows the defendant suffered that it would not have suffered but for such neglect of duty," etc.

Also: "If an agent violates his duties and obligations to his principal, whether by exceeding his authority or by positive misconduct or by negligence or omission in the proper functions of his agency, or in any other manner, and any loss or damage results therefrom to the principal, he is responsible therefor, and must make full indemnity."

Also: "The liability of the agent to his principal is to be

determined by ascertaining the nature and scope of the duty owed to him. Liability follows from the nonperformance of a legal duty."

Also: "It was the duty of the plaintiff to bring to the performance of his undertaking, and to exercise in such performance, that degree of skill, care, and diligence which the nature of the undertaking and the time, place, and circumstances of the performance justly and reasonably demanded. A failure to do this, whereby the defendant suffered a loss or injury, constitutes negligence for which the plaintiff is responsible."

The question proposed by defendant for the special verdict is covered in a more accurate and comprehensive form by the ninth question of the special verdict submitted and rendered immaterial by the findings of the jury in answer to the third, fourth, and eighth questions of the special verdict, to the effect that the plaintiff was not guilty of negligence.

The request first quoted is faulty, in that it invades the province of the jury by assuming that the plaintiff received credible information that the business at the Madison agency was being conducted in an irregular and improper manner, and in stating that it was plaintiff's duty to carefully inspect the Madison office and the business originating therefrom and to institute investigations. This did not appear so clearly from the evidence to be within his duty as to be a matter of law.

The other requested instructions seem to be fairly covered by the following instruction given to the jury:

"The plaintiff as superintendent or agent of the defendant company was bound not only to exercise good faith in the performance of his duties, but he was also bound to exercise reasonable diligence, and to exercise such skill as is ordinarily possessed by persons of common capacity engaged in the same business or occupation. Reasonable diligence and ordinary skill, the law requires that; and good faith, also, the law requires that of every agent. Now, whether *Mr. McKone* failed to exercise such diligence and such skill or not in the supervision of the Madison district is for you to determine from the evidence under the instructions of the court," etc.

The fifth and eighth assignments of error complain of submitting to the jury the third, fourth, fifth, sixth, and eighth questions in the special verdict, and in refusing to strike out those questions, and answers thereunto, on motion after verdict, and in refusing to strike out of the special verdict the questions and answers 5, 6, and 7, and in refusing to set aside the verdict and grant a new trial. This seems to be an illogical and disorderly mode of assigning error, which might justify the court in refusing to consider errors so assigned.

But the questions of the special verdict referred to are as follows:

"(3) Was the plaintiff *McKone* guilty of any negligence in the matter of the supervision of the Madison district in the Ordinary Department? *A.* No. (4) Was the plaintiff *McKone* guilty of any negligence in the matter of the supervision of the Madison district in the Industrial Department? *A.* No. (5) Was check, Exhibit 29, for $240.20 received by *Mr. McKone* through the mail? *A.* No. (6) Was check, Exhibit 31, for $225 received by *Mr. McKone* through the mail? *A.* No. (7) Was check, Exhibit 32, for $207 received by *Mr. McKone* through the mail? *A.* No. (8) Was *McKone* guilty of negligence in forwarding checks to Andres for delivery to him? *A.* No."

It is claimed that these questions were submitted to the jury apparently on the theory that questions are submitted to a jury in an equity case for the purpose of aiding the court in determining what the final judgment should be, and that the verdict in law was not advisory. This is apparently based upon a statement in the charge of the court to the jury, in which the court stated:

"For the purpose of aiding me to better determine as to what the final judgment in this case shall be, I will submit to you in the form of questions certain matters, however, which you will determine from the evidence under the instructions of the court, to the end that I may be aided in rendering a proper judgment by the answers that you will make to these questions."

This language of the court seems to be intended to describe to the jury the function of a special verdict in an action. It is not excepted to, and does not inform the jury that the verdict is advisory, and no question of its accuracy could be raised unless by exception to that portion of the charge. The questions of the special verdict quoted were properly submitted on the evidence before the court. Consequently both the objections thereunto and the motions to change or strike out are unavailing.

The defendant offered evidence as follows, upon the exclusion of which error is assigned: E. E. Mott, inspector for defendant, who had been for about nine years looking up offices, consulting superintendents, taking charge of districts where there was a change of superintendents, and making investigations, was recalled, and asked whether if the Madison office had been inspected, and if collection books had been kept, it would have been possible for those fraudulent and forged claims to have been presented to the defendant without the latter having notice of the fact that they were based on policies upon which no payments for death losses were collectible. Objection to this was sustained, whereupon the question was put as follows:

"If collection books had been kept by each agent who was working under the assistants, had been properly kept, their condition examined and known and reported by *Mr. McKone* to the office, you may state what such inspection and report would have shown as to the condition of the business."

This was objected to as incompetent and immaterial and for other reasons, and the court below sustained the objection on the ground that thereby the witness was asked to pass opinion upon books not in evidence, and that if the books were in evidence the jury would be as competent to find this opinion as the witness. After several further attempts to give this kind of evidence, and after argument, the court ruled that the defendant might show by testimony what the plaintiff's duties were under his contract, and whether he performed

these duties or not; that the result of nonperformance was not a question for an expert or for opinion evidence. This ruling seems to be correct. The questions were not hypothetical in form, and called for inferences of fact not the subject of expert knowledge and which it was the province of the jury to draw. *Oleson v. Tolford,* 37 Wis. 327; *Mellor v. Utica,* 48 Wis. 457, 4 N. W. 655; *Luning v. State,* 2 Pin. 215; *Daly v. Milwaukee,* 103 Wis. 588, 79 N. W. 752; *Lounsbury v. Davis,* 124 Wis. 432, 102 N. W. 941.

There was no reversible error in that part of the charge of the court below which instructs the jury that, if the evidence in the case satisfies them that the plaintiff did fail to exercise reasonable diligence and ordinary skill as theretofore explained, they should answer the question relative to plaintiff's negligence in the affirmative. Exception is taken and error assigned on the use of the word "satisfies" in this connection. It could not have been misunderstood by the jury, and its use in this connection seems to be justified by similar use in the following cases: *Pelitier v. C., St. P., M. & O. R. Co.* 88 Wis. 521, 529, 60 N. W. 250; *Gores v. Graff,* 77 Wis. 174, 46 N. W. 48. There seems to be no serious or reversible error in the form of the special verdict or in the charge of the court.

There remains to be considered the legal effect of the promises of the plaintiff. Andres absconded on November 21, 1903, after perpetrating the frauds mentioned. In a letter dated December 31, 1903, relating to a premium of $7.17 collected by Andres from one Mary Houser on policy No. 324,730, the plaintiff wrote to the defendant, stating:

"The money was never remitted to this office, and was, I expect, appropriated by ex-assistant. I will see that the amount is remitted to company, and will thank you to forward her January 8th receipt by return mail."

There was no act done by defendant after receipt of this letter, except, perhaps, to forward the January 8th receipt. In another letter by the plaintiff to the defendant under date of November 27, 1903, the plaintiff reports some of the de-

falcations of Andres so far as discovered, expresses his grief that such a thing should have occurred, and states:

"The cashier division are writing to me for those Industrial remittances for weeks of November 9th and 16th. I am unable to pay at this time, Mr. Taylor, but I am not going to skip out, and am willing to do the right thing as soon as I can, and would be pleased if you would so inform them."

Under date of November 25, 1903, plaintiff again wrote, informing the defendant of a sum due to one McCarthy which had been intercepted and misappropriated by Andres. This letter stated:

"Please forward me by return mail a check for that amount. I realize my responsibility in the matter, and when we get the account entirely finished up and know the exact shortage I will see that the company is reimbursed for this $35.09."

The defendant did not remit upon either of the last promises, but the plaintiff paid the $35.09 out of money in his hands belonging to the company. In still another case Andres converted to his own use a draft for $144 sent by the defendant to Andres for the purpose of paying a death loss of that amount in the Industrial Department. The creditor of the defendant had received no part thereof, and this amount was due from the defendant to such creditor or beneficiary of the death loss. The plaintiff, doubtless under the impression that he was liable, wrote to the defendant under date of November 25, 1903, substantially as follows:

"As I understand it, check for $144 for payment of abovementioned claim was forwarded to Andres under date of November 9th for payment. . . . I saw the claimant today, investigated the matter, and I know the claim has not been paid. Claimant is to meet me Wednesday, December 2d, at Madison, and I would ask that company send me another check for the claimant by return mail, so this matter can be settled, as company's reputation is at stake. Of course, when Mr. Andres' accounts are finally audited, I will see that this amount is returned to the company. . . ."

The company remitted the $144, and for such second remittance claims to hold the plaintiff liable on the contract said to be contained in the letter above quoted.

The circuit court found in its ninth finding "that subsequent to the defalcations and shortages of said Andres at said Madison office the plaintiff wrote to defendant and its officers certain letters offered in evidence containing promises to make good certain of said losses occasioned by the acts of said Andres; that there was no consideration for said promises contained in said letters." All understand that a consideration is essential to the binding force of a contract. But what is a consideration is not so clear in all cases. If a claim is made in good faith that one is liable for the payment of a sum of money, and in compromise of such claim he promises to pay that sum of money, his promise would rest upon a sufficient consideration, but a "promise to pay where there is no legal obligation, if made in ignorance of rights or under surprise, will not bind." *Logan v. Mathews,* 6 Pa. St. 417. This was where the promisor, believing that he was liable for the repairs of a carriage, promised to pay for the same. In the case at bar there is no evidence of compromise, adjustment, or dispute at or prior to the time of making the promise.

"An express promise to pay a sum of money, which the promisor at the time of making the promise is under no legal, equitable, or moral obligation to pay, is a mere *nudum pactum.*" *Martin v. Stubbings,* 20 Bradw. (Ill. App.) 381.

"A promise made by one who has traveled on a turnpike road to pay tolls is *nudum pactum,* if the promisor was under no obligation to pay the tolls." *Waterloo T. R. Co. v. Cole,* 51 Cal. 381.

"A promise by the master to pay stolen money received by his slave, which has not come to his own hands, is without consideration, and will not support an action." *Jelks v. McRae,* 25 Ala. 440.

Further illustrations may be found in *Nichols v. Mitchell,* 30 Wis. 329; *Messenger v. Miller,* 2 Pin. 60; *Eycleshimer*

v. Van Antwerp, 13 Wis. 546. In *Frey v. Fond du Lac,* 24 Wis. 204, and *Hooker v. Knab,* 26 Wis. 511, it is said that a promise for a past consideration, for which there is not and never has been any legal liability on the part of the party promising, does not create an enforceable contract.

But the case at bar also presents the much discussed question of the sufficiency of a consideration which consists of the promise to perform and the performance of the existing contract obligations of the promisee to a third person. Wald's Pollock, Cont. (3d ed.) 206, 209, *186, *190; 1 Pars. Cont. (9th ed.) note 1, bottom pp. 475, 476; 12 Harv. Law Rev. 515, 519. This question is not new in this state, but has been settled adversely to the validity of such contracts in *Davenport v. First Cong. Soc.* 33 Wis. 387, where it is said:

"It was proposed to show that the plaintiff agreed to surrender and discharge all his debts against the defendant, providing the defendant would, within a reasonable time, pay its indebtedness to its former pastor; and that the defendant accepted the proposition, and at a good deal of trouble and expense raised money and discharged that indebtedness. The only consideration for plaintiff's promise upon these facts was the payment by the defendant of a debt justly due. It might cause the defendant some trouble and inconvenience to pay its debts, but we are not aware of any principle of law which would make such payment alone a sufficient consideration for a promise on the part of its creditor to relinquish his claim."

Other cases to this effect are cited in the notes to *Abbott v. Doane,* 34 L. R. A. 33 (163 Mass. 433, 40 N. E. 197). The mere incidental benefit which might result to the plaintiff holding his position as superintendent at the will of the defendant from the payment of its own debts or the performance of its own obligations to third persons was not, under the circumstances, a consideration for the plaintiff's promise. *Comm. Nat. Bank v. Smith,* 107 Wis. 574, 577, 83 N. W. 766; *Clapp v. Webb,* 52 Wis. 638, 9 N. W. 796; *Havana P. D. Co. v. Ashurst,* 148 Ill. 115, 35 N. E. 873

The other matters found by the court below, viz., that there is no sum of money owing to the defendant by the plaintiff; that it was not shown that Andres collected the items of $200.25, which he attempted to remit, or the item of $198.46, for which he made statement, and that the plaintiff was not guilty of negligence in indorsing in blank and forwarding to Andres checks sent to plaintiff by the defendant for the purpose of paying claims against the defendant arising in Andres' district, seem to be supported by evidence and within the scope of the stipulation authorizing the court to determine all matters not covered by the verdict of the jury. What is the proximate cause of a loss or injury is usually a question of fact, and it is difficult to find in this record any evidence that the losses sustained by the defendant through the frauds of Andres were caused by any act or omission of the plaintiff. The defendant's representative Howry in October, 1903, after many of the frauds of Andres were committed and at the instance of the defendant, visited, examined, and checked up the Madison office of Andres, and apparently did not find or report anything improper or unusual in the conduct of that office. But we have considered the case as if there was such proof because the case was tried and presented on that theory. We find no reversible error in the case.

By the Court.—The judgment of the circuit court is affirmed.

A motion for a rehearing was denied April 9, 1907.

GIBLIN, Appellant, vs. NORTH WISCONSIN LUMBER COMPANY, Respondent.

February 1—April 9, 1907.

County orders: Sale: Failure of consideration: Implied warranty: Action to declare void: Tender of defense: Privity between payee and his assignee: Judgment conclusive between defendants: Contracts against public policy.

1. When county orders are adjudged void there is a total failure of consideration for a prior contract to purchase them.
2. In the sale of county orders there is an implied warranty that the seller has title and that they are not spurious, false, or counterfeit.
3. Where both the payee named in county orders and his assignee were defendants in a taxpayers' action to have the orders declared fraudulent and void, it was not necessary for the assignee to tender the defense of the action to the payee in order to make the judgment conclusive as between them.
4. In such case the payee named in the orders and his assignee were in privity in the action with respect to the invalidity of the orders.
5. Where the plaintiff makes a claim hostile to each and every defendant in the suit, asserting that an instrument for the payment of money in which each defendant has or claims an interest, either as present holder or as privy to the present holder by reason of being a transferrer of such holder, is fraudulent and void and obtains judgment to that effect, the instrument must be held fraudulent and void in any subsequent litigation between the same parties, however they may be arrayed therein against one another.
6. A judgment in a taxpayers' action canceling and declaring void certain county orders is *quasi in rem* and establishes *prima facie*, as against all persons, the status of such orders.
7. A contract whereby the manager of a corporation, who was also chairman of the county board, knowing that an action to have certain county orders declared void was threatened, agreed on behalf of the corporation to purchase and pay for said orders and take chances on the litigation, was *contra bonos mores* and void.

APPEAL from a judgment of the circuit court for Sawyer county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The appellant brought this action at law upon contract for the sale of county orders of Sawyer county aggregating $2,500, and at the close of the testimony the trial judge directed a verdict in favor of the defendant, and from the judgment thereon dismissing the complaint the plaintiff appeals.

The county orders and the contract sued on came into existence as follows: The plaintiff was sheriff of Sawyer county in the years 1901 and 1902, and in August of the latter year made and presented to the county board of supervisors of that county a claim for "compensation and expenses incurred in pursuit of Albert Thompson, $975; A. G. Lewis, $890; J. H. Wagner, $875; Peter Wirleck, $725; Peter Olson, $350; traveled to arrest Charles S. Johnson, 4,000 miles, $400; subpœnaing witnesses in Johnson case, $150; traveled to subpœna six witnesses in Johnson case, 1,000 miles, $100; conveying John Helms, charged with selling liquor without license, $500;" some smaller items more definitely described—the whole aggregating $5,036.60. No dates of performing the alleged services were given, and the claim was not itemized further than shown. In his testimony in this action plaintiff admitted facts showing that the claim for the most part was false and fraudulent. This claim was certified by the then district attorney and verified by the plaintiff. The county board of supervisors of Sawyer county consisted of three members, among them a Mr. Peck, chairman of the board, who was strongly opposed to the allowance of the claim. On November 6, 1902, Mr. Peck resigned and Mr. Robert L. McCormick was elected in his place and held until the next spring election, when he was defeated for election. McCormick, at the time he held the office of supervisor and prior to that time, was an officer and general manager of the defendant corporation. The other two members of the county board were James Erickson, a farmer, and Oscar Holstrom, a saloonkeeper.

After McCormick became a member of the county board,

and on or about December 20, 1902, the plaintiff and his attorney had a conversation with McCormick concerning the allowance of this claim at $2,500, and it was substantially agreed outside of the session of the board and between McCormick and the plaintiff that the board would allow the bill at $2,500, and that McCormick would take the county orders to be issued thereon and use them in the payment of taxes. The plaintiff suggested that if the claim were allowed at $2,500 he would not get that much money because the county orders were at a discount, and that if the bill were allowed somebody might stop it, and McCormick thereupon informed the plaintiff that he would take the orders at their face because he had taxes to pay, and that he did not think anybody would stop the issue of the orders, because $2,500 was a reasonable sum, and if they did he (McCormick) would take care of it and take his chances. The claim was again presented to the county board and allowed at $2,500 on or about January 5, 1903, McCormick not voting. The county orders in question were issued in payment of said claim and delivered to an employee of the defendant corporation, and some days thereafter the plaintiff called at the office of the defendant and indorsed the county orders by signing his name on the back, leaving them in the possession of the defendant. The defendant corporation delivered the county orders to the town treasurer, one Skogstad, in payment of part of its taxes then payable to the town treasurer. The plaintiff and McCormick were expecting that some of "their enemies" might bring in injunctions against the payment of these county orders or the allowance of this claim and recognized that haste was necessary or at least desirable.

While matters were in this condition A. M. Carpenter and the Chippewa Farm Land Company on or about February 25, 1903, began a taxpayers' suit against Sawyer county, its treasurer, the said three members of its county board, the plaintiff, the defendant, and others for the purpose of enjoin-

ing the payment of said county orders or the receipt of the same for taxes, or the recognition of the same in any manner as evidence of indebtedness of Sawyer county. This suit was also directed against other county orders besides those involved in this action. Skogstad, who was a defendant and who had received the county orders in question in payment of defendant's taxes, served an answer and cross-bill asking for affirmative relief against the defendant corporation, to the effect that such corporation be required to pay him in money the taxes which they had attempted to discharge by delivery of said county orders. The plaintiff appeared and answered in the taxpayers' suit and the defendant corporation and the three supervisors defaulted therein. That suit was prosecuted to judgment, whereby "it was ordered, adjudged, and decreed that the following orders issued by the county clerk of Sawyer county on the county treasurer of said county are, and each of them is, wholly illegal and void . . . to wit: . . . county orders issued . . . in favor of the defendant, *William Giblin,* and numbered 12,085 to 12,091, inclusive." There was also a perpetual injunction decreed against paying said orders or any of them, or receiving the same for taxes, or in any manner recognizing the same as evidencing valid indebtedness of said Sawyer county. On the cross-bill of Skogstad the defendant corporation was required to repay to the county the amount of taxes attempted to be paid by the defendant by means of the illegal county orders in question, with interest from January 5, 1903, and it did so.

For the appellant there was a brief by *Frank B. Lamoreux* and *H. B. Walmsley,* and oral argument by *Mr. Walmsley.* They contended, *inter alia,* that as the county orders were mere choses in action there was no implied warranty except that of genuineness. 15 Am. & Eng. Ency. of Law (2d ed.) 1220, 1240; *White v. Robinson,* 50 Mich. 73, 14 N. W. 704; *Otis v. Cullum,* 92 U. S. 447; *Meyer v. Richards,* 163 U. S. 385, 413; *Lawton v. Howe,* 14 Wis. 241, 250; *Hurd v. Hall,*

12 Wis. 112, 137; *Getty v. Rountree,* 2 Pin. 379, 386; *Littauer v. Goldman,* 72 N. Y. 506, 517; *Hall v. Conder,* 26 L. J. C. P. 138. Plaintiff is not concluded by the judgment in the taxpayers' action because no issue was there presented between him and the defendant in this action. 24 Am. & Eng. Ency. of Law (2d ed.) 731–733; sec. 2656*a,* Stats. (1898); *Pioneer S. & L. Co. v. Bartsch,* 51 Minn. 474, 38 Am. St. Rep. 511; *Jones v. Vert,* 121 Ind. 140, 16 Am. St. Rep. 379; *Ostrander v. Hart,* 130 N. Y. 406; *Finley v. Cathcart,* 149 Ind. 470, 63 Am. St. Rep. 292, 297, 298; *Saveland v. Green,* 36 Wis. 612, 624.

For the respondent there was a brief by *Wickham & Farr* and *F. L. McNamara,* and oral argument by *Mr. McNamara* and *Mr. James Wickham.*

TIMLIN, J. If we assume as most favorable to the appellant that there was evidence tending to show that the defendant, through McCormick, purchased these county orders from the plaintiff and agreed to pay $2,500 therefor, there still remain many insuperable legal obstacles to the plaintiff's recovery. One is that, the county orders so sold having been adjudged in the taxpayers' suit fraudulent and void, there was a total failure of consideration. 1 Parsons, Cont. (9th ed.) 462, 463, and cases; *Rowe v. Blanchard,* 18 Wis. 441. Another is that in the sale of such nonnegotiable choses in action there is an implied warranty that the seller has title and that the chose is not spurious, false, or counterfeit. *Giffert v. West,* 33 Wis. 617; *Scott v. Hix,* 2 Sneed, 192, 62 Am. Dec. 458, 468, and cases in note; *Roehl v. Volckmann,* 103 Wis. 484, 79 N. W. 755. The decree in the taxpayers' suit having been offered in evidence, it was competent evidence not only against the parties actually named in said suit, but also against all the taxpayers and citizens in said county. *State ex rel. Wilson v. Rainey,* 74 Mo. 229; *Clark v. Wolf,* 29 Iowa, 197; *Sauls v. Freeman,* 24 Fla. 209, 4 South. 525;

Bear v. Board of Co. Comm'rs, 122 N. C. 434, 29 S. E. 719; *Scotland Co. v. Hill,* 112 U. S. 183, 5 Sup. Ct. 93. Both the plaintiff and defendant in this cause were parties to that taxpayers' suit brought by Carpenter and another to enjoin payment of the county orders in question.

The appellant seeks to avoid the effect of the foregoing by two propositions: First, he contends that in an action brought by a plaintiff against several defendants the judgment or decree therein is not conclusive upon two or more of said defendants in a subsequent controversy between themselves over the same subject matter; second, that where a judgment or decree is not conclusive it is not evidence at all,—citing to the first proposition 24 Am. & Eng. Ency. of Law (2d ed.) 731, 733, and cases there referred to; and citing to the second proposition *Pioneer S. & L. Co. v. Bartsch,* 51 Minn. 474, 53 N. W. 764, which declares that the rule is familiar that, "as against any one except the parties and their privies, a judgment is evidence only of the fact of its recovery." We are reminded that the lumber company, defendant, did not tender the defense of the taxpayers' action to the plaintiff, and it is asserted that there was no privity between the defendants in that action, the *North Wisconsin Lumber Company* and *William Giblin.* Upon these last two propositions we are convinced that no tender of the defense of the taxpayers' suit to *Giblin* was necessary; he was himself a defendant therein and controlled his own defense, and had every opportunity to prove the county orders in question valid if he was able so to do, and that in such case the requirement of tendering the defense of an action to one liable over to a defendant has no application. *Giblin* was also in privity with the *North Wisconsin Lumber Company.* He was its vendor. The very action that he has now before the court assumes and is based upon privity by contract. But the rule that an adjudication in favor of a plaintiff against two or more defendants is not binding upon such defendants is rather an exception to the rule that all parties to a decree are concluded thereby, than a rule itself.

This exception relates to matters between codefendants which are not in themselves necessarily involved in the plaintiff's contention against each and all the defendants, or matters which are not the main object and purpose of the plaintiff's suit. But where the plaintiff makes a claim hostile to each and every defendant in the suit, asserting that an instrument for the payment of money in which each of the defendants claims an interest or has an interest, either as present holder or as privy to the present holder by reason of being a transferrer of the present holder, is fraudulent and void, and obtains a decree affirming his claim against such instrument, that instrument must be held fraudulent and void in any subsequent litigation between the same parties however they are arrayed against one another in such subsequent litigation. In *Louis v. Brown Tp.* 109 U. S. 162, 3 Sup. Ct. 92, the plaintiff brought an action at law against Brown township on bonds and interest coupons of the defendant township and the defendant filed two pleas of former adjudication. By the first of these pleas it was averred that in an action brought by one Hiram Hipple, the owner of real estate incumbered by mortgage given to secure the payment of these bonds, which action was against the trustees of Brown township, Richard B. Hopple and others, and in which Richard B. Hopple filed a cross-bill alleging the bonds and mortgage to be valid and praying that said bonds and mortgage might be declared to be valid and for a decree of foreclosure, it was adjudged that these bonds were void for want of authority in the trustees of Brown township to issue the bonds. It was also averred that the plaintiff claimed under Richard B. Hopple. With reference to the first plea the court said:

"But if there had been no cross-bill, the fact that both Hopple and the trustees were placed as defendants in the suit of Hipple does not impair the conclusive character of the decree in that case as between those parties. The present case is precisely analogous to that of *Corcoran v. Chesapeake & Ohio C. Co.* 94 U. S. 741."

It would be a rather extraordinary condition if county orders, municipal bonds overdue, or other nonnegotiable choses in action which have been by proper decree of a court of equity declared fraudulent and void could be dealt in and bought and sold thereafter, and in every case the purchaser would have to prove over again the fraudulent character or invalidity of such choses in action, and could not use the decree declaring the paper invalid and fraudulent to establish *prima facie* such claim. This would make judicial investigation of that proposition interminable, facilitate fraud, and result in many cases that the things in action would be held void in one lawsuit and valid in another, according as evidence was available or unavailable or the fortunes of litigation fluctuated. It may be answered, all this could be obviated by requiring the instruments to be surrendered up and canceled by the original decree. But the complainant in that case is usually satisfied if he obtains an adjudication which protects him or the corporation for which he sues and is not apt to be concerned in the protection of the general public. Where the instruments are negotiable the complainant will usually have this inserted in his decree. Where they are nonnegotiable he is apt to be indifferent. In Simonton, Mun. Bonds, § 119*a*, it is said that the doctrine of *lis pendens* has no application to negotiable paper, and the holder of negotiable bonds is not therefore affected by any litigation to which he is not a party, and a decree or judgment in such suit will not bind him; but if he purchase such paper after maturity and after it has been adjudged void, he is bound by the judgment. He also refers to *Stewart v. Lansing*, 104 U. S. 505, which is worth considering in this respect. Coupon bonds of the town of Lansing in New York were by commissioners executed to a railroad company pursuant to an order of the county judge acting under authority of a statute. Certain taxpayers of the town procured a writ of *certiorari* to be issued from the supreme court to the county judge for a re-

view of this determination, and the supreme court reversed, and in all things held for naught, the judgment of the county judge appointing commissioners and authorizing the issue of the bonds. Pending this proceeding, however, the commissioners issued the bonds to the railroad company, and it disposed of them to various persons, among others to Stewart, the plaintiff. The supreme court said:

"As between the railroad company and the town, the judgment of the supreme court reversing and annulling the order of the county judge invalidated the bonds. The judgment of reversal was equivalent between these parties to a refusal by the county judge to make the original order. The next inquiry is whether, on the evidence, Stewart occupied in this suit a better position than the town. That depends on whether the testimony was such as to make it the duty of the court to submit to the jury, under proper instructions, the determination of the question whether he was in a commercial sense the *bona fide* holder of the coupons sued for. . . . Here the actual illegality of the paper was established. It was incumbent, therefore, on the plaintiff to show that he occupied the position of a *bona fide* holder before he could recover."

After holding that there was sufficient evidence tending to show that Stewart was not a *bona fide* holder, it was ruled that it was not error to direct a verdict in favor of the town. In this case the invalidity of the bonds as against Stewart was proven by the judgment of the supreme court to which Stewart was not a party, it having been ascertained that he was not in a commercial sense the *bona fide* holder of the coupons sued on. There is some conflict and uncertainty with reference to the admissibility of judgments in evidence against persons not parties to the judgment or privy to such parties. And the rule is by no means settled, and by no means without exception, that a judgment is not evidence in any case in which it is not conclusive evidence. It is said that

"a record may be used to establish the fact of such judgment and the legal effect thereof, and cannot be collaterally attacked, even by strangers. The rule is stated by Sir James

Stephen as follows: 'All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually effect when the existence of the state of things so effected is a fact in issue or is or is deemed to be relevant to the issue.' So, verdicts and judgments on questions of a public nature, where evidence of a general reputation would be received, have been admitted, although the parties were not the same nor in privity, but not as conclusive evidence; and, as will hereafter be shown, judgments in actions *in rem*, in so far at least as they fix the status of the particular subject matter, may not only be admissible, but may also be conclusive in a proper case, even against strangers to the record." 2 Elliott, Ev. § 1525, and cases; *State ex rel. Atkinson v. McDonald,* 108 Wis. 8, 84 N. W. 171.

Certain decrees in equity are classified as *quasi in rem,* and such decrees may be offered in evidence as against any person with respect to the particular property described therein for the purpose of establishing *prima facie* the status of that property. *Arndt v. Griggs,* 134 U. S. 316, 10 Sup. Ct. 557; *Fry v. Taylor,* 1 Head, 594; *Liginger v. Field,* 78 Wis. 367, 47 N. W. 613. A decree declaring invalid, fraudulent, or spurious municipal obligations which are nonnegotiable but readily assignable is of this latter class. Consequently the decree in the taxpayers' suit mentioned canceling and perpetually enjoining payment of the county orders in question was binding upon the plaintiff and defendant in this action as determining that said county orders were invalid and worthless, first, because they were both parties to the taxpayers' suit and the matter of the invalidity and illegality of these county orders was a direct issue in that action between the plaintiff and each defendant therein; second, because they were residents and inhabitants of the county for and in whose behalf the taxpayers' action was carried on; third, because the plaintiff and defendant were in privity in said action with respect to the invalidity of said county orders; and fourth, because the decree in such case is *quasi in rem* and establishes *prima facie* as against all persons the

status of the chose in action canceled up and declared fraudulent and invalid.

The appellant next contends that there was an agreement on the part of the defendant, through McCormick, to take these county orders for better or worse; that is to say, to take them and pay $2,500 therefor, and take its chances on the taxpayers' action which was expected or threatened. We do not think there is any sufficient evidence to establish *prima facie* such an agreement on the part of the defendant, but if we assume that there was sufficient evidence for that purpose, then we would have a case where the chairman of the county board of supervisors and general manager of the defendant corporation, having notice that the taxpayers' suit to cancel up the county orders in question or to enjoin the collection by the plaintiff, *Giblin,* of his claim filed with the county board for allowance was threatened, agreed to purchase said claim and pay $2,500 therefor and take his chances on the litigation, which means that he would place himself in an attitude of hostility to the suit brought in behalf of the county by its taxpayers and defeat such suit if possible. Such an agreement, if made by the corporation through the county chairman acting for it, would be *contra bonos mores* and void. In whatever way we look at this case the judgment of the circuit court must be affirmed.

By the Court.—The judgment of the circuit court is affirmed.

WM. S. MERRELL CHEMICAL COMPANY, Appellant, vs. A. SPIEGEL COMPANY, Respondent.
SAME, Respondent, vs. SAME, Appellant.

March 19—April 9, 1907.

Contracts: Construction: Court and jury: Selection of goods sold: Warranty: Evidence of breach.

1. The construction of a written contract, when not dependent upon extrinsic facts as to which the evidence is conflicting, is a question of law for the court.
2. In a contract for the sale of a stock of drugs and pharmaceutical preparations, a provision that all the stock furnished should "be carefully selected to meet the wants of the physicians and druggists" of the vendee's locality is construed not to be a warranty that the goods should be adapted and suitable to meet such wants, but at most an agreement on the part of the vendor, if it assumed to select the stock, to exercise due care and good faith in making the selection for the purpose specified; and where such care and good faith are shown, evidence that orders by subsequent purchasers from the vendee called for a small percentage of goods not included in the stock selected by the vendor does not even tend to show a breach of the contract.

APPEALS from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed on plaintiff's appeal.*

Action upon a promissory note of $375, to which was interposed, first, a defense that the consideration of the note was a certain mutual contract which had been breached in certain respects by the plaintiff; and, secondly, counterclaim based upon the same contract and the alleged breaches thereof. The plaintiff is a manufacturer of drugs and pharmaceutical preparations at Cincinnati, Ohio. The defendant, for many years, has been engaged in the drug business at Milwaukee, both as a retailer and a jobber, and had for many years prior to 1903 been familiar with the goods manufactured by the plaintiff, which were well-known articles in the trade. On

or about June 1, 1903, the parties entered into a written contract whereby the plaintiff agreed to sell and the defendant to purchase a stock of goods of plaintiff's manufacture to the amount of $1,500, at a discount from retail prices specified in the catalogue of forty per cent. and twelve and one-half per cent. on part, and forty per cent. and ten per cent. on part—"all the stock thus furnished to be carefully selected to meet the wants of the physicians and druggists of Milwaukee, Wisconsin, and vicinity;" the defendant agreeing to give the plaintiff its active influence and co-operation in extending the sale of the latter's preparations in the prescribed territory, and to keep up the assortment of said stock so as to meet the requirements of the drug trade and the medical profession. The term of the contract was one year. The plaintiff agreed to personally canvass by competent agents the territory tributary to Milwaukee and to turn over orders to the defendant for execution to the amount of $1,000 within a year. Also to exchange such goods as might be found least desirable for trade, for other articles of plaintiff's manufacture, with certain limitations as to time, and also the limitation that exchanges should only be made in what was called part 1 of the catalogue. Part 1 of the catalogue contained all the staple drugs and preparations in the various forms of oils, elixirs, tablets, pills, powders, and the like, from which approximately five sixths of all sales were ordinarily made, while parts 2, 3, and 4 contained certain specialties and proprietary combinations. The grounds of counterclaim were: First, that the stock of goods shipped to the defendant was not carefully selected so as to meet the demands of the trade at and tributary to Milwaukee; and, secondly, that the plaintiff did not, in accordance with the contract, duly canvass such territory and turn over orders to the defendant, and that such orders as it did take and turn over were not at adequate prices.

The court directed a verdict for the plaintiff upon its note, and submitted to the jury a general verdict upon defendant's

counterclaim, whereon the jury found damages in defendant's favor to the amount of $400, which, being deducted as of the date of the verdict from the amount of the $375 note with interest from its maturity, left a balance of $29.68 in plaintiff's favor, for which judgment was entered. Plaintiff had moved to direct a verdict in its favor on the counterclaim, and also moved to set aside the verdict and grant a new trial. Defendant moved for a judgment in its favor based upon an allowance of interest on the $400 damages from the date of the breach of the contract. Plaintiff appeals from so much of the judgment as allows any part of the counterclaim to be deducted from the amount of its note and interest. Defendant appeals from so much as disallows it interest upon its damages from the time of the alleged breach of the contract by plaintiff.

For the plaintiff as appellant there were briefs by *Winkler, Flanders, Bottum & Fawsett,* and a reply brief signed also by *Stanley W. Merrell,* of counsel; for the plaintiff as respondent there was a brief by *Winkler, Flanders, Bottum & Fawsett;* and the cause was argued orally by *F. C. Winkler* and *C. F. Fawsett.*

For the defendant there was a brief by *Glicksman & Gold,* and oral argument by *W. L. Gold.*

DODGE, J. The trial of this action proceeded upon the construction of the contract that, if the plaintiff assumed the duty of making the selection of the goods in question, there resulted a warranty that the same should be adapted and suitable to meet the wants of the physicians and druggists of Milwaukee and vicinity, and the court submitted to the jury the question whether that duty of selection was cast upon the plaintiff or the defendant and whether the goods satisfied that warranty. In these respects we think obvious and radical error was committed. The construction of the written contract, unless dependent upon some conflicting extrinsic facts,

was for the court as a question of law. We find no evidence of extrinsic facts which could have withdrawn this question from the field of judicial construction and transferred it into a question of fact. Approaching it in this light, and conceding, for the purposes of argument, that the parties contemplated that a selection would be made, or at least originally suggested, by the seller, it seems to us obvious that, nevertheless, there was no warranty expressed therein that the goods so selected should accord with the demands developed in practical working of the trade in and about Milwaukee thereafter. The articles themselves named in the plaintiff's catalogue were well-known commodities, the quality of each of which for the purposes designed is in no wise assailed. The selection of $1,500 worth therefrom was, of course, merely a choosing of those articles most likely to meet the demands of the prescribed locality and in the proportions most likely to accord with that demand. What that demand would prove to be was, of course, impossible of knowledge beforehand. While the diseases generally prevalent in a given vicinity may be measured by past experience to some extent, any attempt at prophecy must of necessity be approximate only. An epidemic of some not usually prevalent disease may cause a demand for certain kinds of medicines wholly disproportionate to anything suggested by past experience. It is therefore inconceivable that parties should undertake that any assortment of drugs and medicines made up in advance should prove to accord with the demands developed through an ensuing year. The defendant had the experience of years in the drug trade in the vicinity, and necessarily knew as much, or more, of the probabilities, as also of the uncertainties, as could the plaintiff.

From considerations such as these we reach the conclusion that there was in this contract no warranty, but, at best, an agreement on the part of the plaintiff to exercise due care and good faith in any selection it might make, if it assumed to

select the stock of goods thus contracted for. The proof as to the conduct of the plaintiff in reference to this selection is undisputed. Its agent, who had negotiated the contract and had had two or three years' experience in the jobbing trade in drugs in Milwaukee and Wisconsin, was asked by the defendant to prepare a list of goods preliminarily to the signing of the contract, and did so, delivering it to the defendant, in whose possession it remained for approximately a week, when it was returned to plaintiff's agent, without comment, and as apparently satisfactory. This list was made, as plaintiff's agent testifies without contradiction, upon a computation by him of his own experience in selling goods from the plaintiff's catalogue in the jobbing trade at and near Milwaukee, principally to physicians. He made a careful analysis and tabulation of the orders which he had taken and of the quantities of the various articles which had been sold during those years, and made his list both in the selection of medicines and in the proportions thereof according to such experience. If this be true, it is full and complete compliance with the contract in that respect on plaintiff's part. It is a careful selection, made in good faith, with reference to the probable demands and needs of the physicians and druggists of Milwaukee and vicinity. A careful search of the evidence discloses none in conflict, except that of one of defendant's officers to the effect that the stock did not prove to be well adapted to the demand at Milwaukee and vicinity. It should be said here, in parenthesis, perhaps, that the experiment extended only from June until mid-September, when defendant repudiated the contract, and all further experiments with the jobbing trade ceased. This testimony of the defendant's officer is shown by his cross-examination to depend entirely on the fact that it was unable to fill all of the orders which plaintiff's agent obtained and turned over to it, out of the stock which had been supplied it, but was obliged in many, if not most, instances to order still further goods from the plaintiff to complete the

orders taken. This evidence is very much weakened by the admission of the witness that he knew nothing of the subject personally, except what was told him by clerks and subordinates. It is, however, made to appear that such orders were filled out of the stock on hand to a large extent, and that generally not more than twenty-five per cent. thereof was found to be lacking, and it was proved, practically without dispute, that a large portion of the extra goods ordered to enable the filling of these jobbing orders by the defendant were rendered necessary, not by inadequacy of the stock selected by plaintiff, but were required in advance of the receipt of that stock. Further, as bearing upon this subject, it is significant that, from the making of the contract about the 1st of June until its repudiation in September by the defendant, some thirty-five specific jobbing orders had been filled without any complaint or suggestion that the stock supplied under it was not found to be adapted to the demand disclosed by specific purchases. We cannot think this evidence, merely to the effect that these subsequent orders by purchasers called for a small percentage of goods which were not included in the stock selected by the plaintiff, can serve at all to put in issue the full and complete proof of the exercise of care and honest judgment in their selection. Hence we conclude that there was no proof to go to the jury as to the breach of this term of the contract.

As to the other alleged breach by the plaintiff, that it did not diligently canvass the contract territory and did not make sales in accordance with the contemplation of the contract, the record is equally barren of evidence. The proof is direct and undisputed that plaintiff's agent persistently and continuously solicited trade from physicians and retail druggists, and in the course of about three months turned over to the defendant orders for approximately $300 worth of goods. The only duty in this respect assumed by the plaintiff was that, within the year, it would obtain and turn over such orders to

the amount of $1,000. Clearly, this stipulation is not shown to have been breached. But the contention now made by the defendant is that the goods were not sold at a high enough price. They were substantially all sold at a discount of twenty-five per cent. from the retail list price, thus yielding a profit to the defendant of over forty per cent. upon some goods, while upon others it may have been as low as twenty-five per cent. At one place defendant seems to suggest that it expected that these sales to the jobbing trade would be made at list prices; but this was wholly refuted by the fact that the list prices were those at which retail sales were expected to be made to individuals, and by the express testimony of Mr. Spiegel himself that he knew that sales to the jobbing trade were to be at a discount. There is abundant proof that this rate of discount was usual in jobbing sales and sales to physicians. There is therefore no proof that defendant had any reason outside the contract to expect any larger prices to be obtained, and, inasmuch as the contract is entirely silent as to the rates at which these jobbing orders were to be taken, we can find no evidence to justify a holding of any breach in this respect. The good faith of this part of defendant's contention is at least impugned by the fact that, for three months, it persisted in filling these orders as they came in, at this uniform price, without comment or complaint, and that not until it declared its intention to repudiate the contract, and refused to pay the note which it had given for part of the purchase price, was any suggestion made that the sale price was not in accord with its understanding and expectation or with the contract.

Our conclusion is that uncontradicted evidence established complete performance of the written contract on plaintiff's part and that the counterclaim was unsupported by any evidence. All the issues appear to have been exhaustively tried, and we can discover no reason to anticipate that the situation could be changed upon further trial.

By the Court.—Upon plaintiff's appeal judgment reversed, and cause remanded with directions to enter judgment in accordance with the prayer of the complaint; defendant to take nothing by its appeal.

SIEBECKER and KERWIN, JJ., dissent.

CASSODAY, C. J., and TIMLIN, J., took no part.

MAIN and others, Respondents, vs. PROCKNOW and others, Appellants.

March 20—April 9, 1907.

Contracts: Rescission: Waiver by claim for damages: Sales: How rescinded: Grounds: Evidence of damage.

1. A complaint or counterclaim for damages for breach of a contract is in affirmance of the contract and inconsistent with a claim that the contract has been rescinded, and is a waiver of any right to a rescission.
2. A contract cannot be rescinded in part and affirmed in part.
3. Rescission of a contract of sale by the buyer after delivery of the goods consists of a return of the goods within a reasonable time upon sufficient grounds, and refusal to pay the stipulated price therefor.
4. Where a written contract for the sale of jewelry particularly described the articles and specified the prices in detail, it was not sufficient ground for a rescission by the buyer that, when received, the goods did not come up to expectations, were too high priced, would not sell in that locality, and did not contain certain articles not specified in the contract.
5. Where, under a counterclaim for damages in an action for purchase price of goods, there was evidence of breaches of the contract by plaintiffs but no evidence of damage, there was nothing to submit to the jury as to such breaches.

APPEAL from a judgment of the county court of Winnebago county: C. D. CLEVELAND, Judge. *Affirmed.*

From a judgment in favor of the plaintiffs in an action at law upon contract the defendants appeal.

April 27, 1901, the parties entered into a contract in writing for the purchase of certain jewelry by the defendants from the plaintiffs, particularly specifying the articles, and providing, among other stipulations not relevant here, (1) that plaintiffs would furnish without charge to defendants a show case wherein to exhibit such jewelry; (2) would guarantee a profit of $50 on the purchase, which amounted to $150; (3) would not sell to any other dealer south of the Fox river in the city of Oshkosh. This last stipulation was added by indorsement on the back of the contract at the time of closing the same. May 2, 1901, the goods were shipped by the sellers. May 8, 1901, the purchasers wrote to sellers, acknowledging receipt of goods, but complaining of shortages to the amount of about $15, that the show case had not arrived nor the "guaranty cards" to be exhibited in the show case. May 8, 1901, sellers answered, acknowledging shortage, stating the goods short had been sent, not, however, expressly mentioning the show case; but the evidence shows, without definiteness as to date, that a flat show case had been sent and arrived at the freight office at Oshkosh, but buyers refused to receive it, and we infer that it arrived prior to May 21, 1901. The sellers also made good the shortage to which their attention was called. On May 21st buyers wrote saying that they had examined the goods; that they did not come up to expectations; were too high priced for them to handle; would not sell in that neighborhood, and contained no rings "gentlemen's size;" that they held the goods subject to the order of the sellers, and that this determination was final. They made no claim on account of the show case or on account of a breach of the agreement not to sell to others in Oshkosh south of the Fox river, and they returned the jewelry by express to the sellers, who refused to receive it. Other correspondence followed. The buyers did not recede from this position, but added to their reasons given in the letter of May 21st that the sellers had broken the agreement by a sale

on May 2, 1901, to Reimer, a dealer within the prohibited territory, and that the show case sent was not of the kind orally agreed upon between sellers' salesman, Culver, and the buyers, and that there was some shortage in the goods.

To a complaint for the agreed selling price of the goods the buyers answered that the agreement was partly in writing and partly verbal, and the sellers failed to furnish the show case of the kind orally agreed upon; failed to furnish jewelry of the kind agreed upon, and sold within the prohibited territory, and that they returned the goods. They also pleaded a counterclaim in which they incorporated by proper reference all the averments of the answer mentioned above except the averment of the return of the goods, reiterated the breach by sale of goods south of the Fox river, and conclude, "that these defendants were damaged for and on account of the violation of said agreement by these plaintiffs in the sum of $150. Wherefore defendants demand judgment that the said agreement between plaintiffs and defendants be reformed and amended as above set forth, and that their counterclaim be allowed and the complaint herein be dismissed, with costs."

For the appellants there was a brief by *Felker, Stewart & McDonald,* and oral argument by *F. C. Stewart.*

For the respondents there was a brief by *Earl P. Finch,* attorney, and *Wilbur E. Hurlbut,* of counsel, and oral argument by *Mr. Hurlbut.*

TIMLIN, J. The objections contained in the letter of the buyers of May 1st were wholly insufficient and unavailable against a written contract of sale deliberately entered into and signed on April 27th which described goods and prices in detail. That contract was not to furnish goods suitable or salable in Oshkosh, or low priced goods or goods containing any proportion of rings "gentlemen's sizes," but was to furnish the goods described therein at the prices therein specified. The first shortage of goods having been made good at the re-

quest of the buyers, this is also out of the case. This leaves only three grounds of objection, viz.: the sale to Reimer on May 2d, the show-case agreement, and the last shortage. Of these the court below, under proper instructions, submitted to the jury only the last, and the jury found against the buyers thereon. We think there was no sufficient evidence upon which the jury could have found otherwise, and this eliminates all alleged error in the submission of this question or in the charge relating thereunto. Was it error to take from the jury all question of breach of the contract by sellers by their sale to Reimer and by their failure to furnish a different show case? It was not controverted that the plaintiffs had made the sale to Reimer, but they claimed they had the consent of defendants so to do. The court accepted the version found in defendants' pleadings of the supplemental oral contract to furnish an upright show case. The defendants by their pleadings were in the position of claiming a rescission of the contract of sale by reason of these breaches on the part of plaintiffs and at the same time counterclaiming against the plaintiffs for damages growing out of these breaches. This cannot be done. A complaint seeking to recover damages for breach of a contract or a counterclaim seeking to recover like damages is in affirmance of the contract. Such pleadings are inconsistent with a claim that the contract has been rescinded or that the party occupying this position on the record is entitled to a rescission. This rule is not limited to cases involving fraud. A party to a contract may waive his right to rescind after it has accrued by instituting an action to recover damages for the breach by the other party. *Wheeler v. Dunn,* 13 Colo. 428, 22 Pac. 827; *Sanger v. Wood,* 3 Johns. Ch. 416; *Nelson v. Carrington,* 4 Munf. 332, 6 Am. Dec. 519; *Conrow v. Little,* 115 N. Y. 387, 22 N. E. 346. Nor can a contract be rescinded in part and be affirmed in part. *Hendricks v. Goodrich,* 15 Wis. 679; *Minert v. Emerick,* 6 Wis. 355; *Williams v. Ketchum,* 21 Wis. 432. So that the de-

fendants could not affirm the contract by counterclaiming upon it for damages for breach of the provision thereof forbidding the sale of the goods south of the Fox river and the other provision relating to the show case, and at the same time disaffirm the contract by return of the goods and refusal to pay any part of the purchase money. The defendants had, however, the right to retain the goods and recover damages for the breach of the contract by the plaintiffs in the foregoing particulars. They offered evidence of the breach, but offered no evidence of any damage sustained thereby. There was nothing, therefore, to submit to the jury with reference to the alleged breaches of the contract on the part of the plaintiffs. The circuit court properly submitted to the jury the only issue there was in the case for the jury.

As to what constitutes at law a rescission of a contract, *Second Nat. Bank v. Larson,* 80 Wis. 469, 50 N. W. 469; *Kinney v. Kiernan,* 2 Lans. 492; *State (Skillman H. M. Co.) v. Davis,* 53 N. J. Law, 144, 20 Atl. 1080; *Clarke v. McGetchie,* 49 Iowa, 437. In short, rescission at law after delivery of goods sold consists of a return of the goods within a reasonable time upon sufficient ground and refusal to pay the stipulated price therefor. This is one of the rights of the buyer. The other, an inconsistent right, is the right to recoup damages. The judgment must therefore be affirmed.

By the Court.—The judgment of the county court is affirmed.

CASSODAY, C. J., took no part.

BRILLION LUMBER COMPANY, Respondent, vs. BARNARD and another, Appellants.

March 20—April 9, 1907.

Reference: Long account: Principal and surety: Bond of employee: Execution induced by false representations: When bond takes effect: Defenses of surety: Pleading: Amendment: Discretion: Evidence: Books of account, etc.: Appeal: Directing judgment.

1. An order of compulsory reference may be based in part on statements of counsel to which no objection is made; and where such statements are not preserved in the record it will be presumed that the reference was proper.
2. To warrant a compulsory reference under sec. 2864, Stats. (1898), on the ground that the examination of a long account will be necessary, the action need not be strictly based on the account or be for an accounting. It is sufficient if there is a long account in the proper sense which is directly involved, so that it must, in the regular course of the trial, necessarily be examined as substantially the basis of the claim for a recovery.
3. If the proposed surety in a bond for the conduct of an employee makes inquiry of the proposed obligee as to the previous conduct of the employee, such obligee is bound to make full disclosure of all material facts within his knowledge bearing on the risk, and if he fails to do so or knowingly makes, in response to the inquiry, false representations as to such facts, or does so ignorantly but under such circumstances as would naturally lead the inquirer to believe the representations to be based on an investigation, and the proposed surety is thereby induced to sign the bond, he may avoid liability thereon on the ground of fraud.
4. But an innocent false representation in such a case, such as the assertion of a mere opinion or the misstatement of a fact through mere ordinary negligence, not made under such circumstances as to suggest that it was based on an investigation, will not relieve the surety of liability.
5. In general a bond speaks from its date, but upon proof that it was delivered at a later time the primary presumption is displaced by one that it was intended to take effect from its delivery only, unless by its terms it satisfactorily appears that the parties intended it to take effect from its date or some other time.

6. A bond given to secure faithful performance by an employee of his duties under a contract of employment dated February 11, bore the same date, but was not delivered till May 6. When first presented for signature the bond provided that it should "expire with the time of service as specified in the contract" (which time was not fixed but depended on mutual satisfaction of the parties), but before being signed it was changed so as to provide that it should "expire one year from the date hereof." *Held*, that the bond took effect as of the date of the contract and covered defalcations, if any, between such date and its delivery.
7. In an action by an employer upon the bond of an employee, the surety must specially plead, in order to avail himself of, the defense of a release by reason of the employer having made a contract with the employee permitting the latter to repay the money misappropriated by working a sufficient length of time to balance the same with his wages, or by reason of the imposition upon the employee of duties not contemplated by the contract and materially increasing the risk of the surety, or by reason of the employer having prejudicially retained the employee in the service after discovering his delinquency, concealing the situation from the surety.
8. Refusal to permit an answer to be amended so as to set up new defenses is *held* not an abuse of discretion where no excuse was given for delay in making the application.
9. In an action upon the bond of an employee the books kept by him as a part of his duties during the period of service covered by the bond are evidence against the surety, but not so as to unverified invoices and books kept by the employee before said period.
10. Thus, an inventory of stock on hand a month and a half before the commencement of the term of service covered by the bond, together with unverified invoices and a sales book kept by the employee, do not, as against a surety on the bond, show the amount of stock on hand when said term of service began.
11. Where there was a failure of proof as to some fact essential to a recovery and there is no reasonable probability that the lacking proof would be supplied on another trial, the supreme court will direct the judgment to be entered below without remanding the case for a further hearing.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Reversed in part; affirmed in part.*

Action to recover of a surety.

This in substance is the plaintiff's claim as pleaded: February 11, 1901, plaintiff and defendant *George Barnard* made a contract whereby the latter engaged in the service of the former as retail salesman and manager of its lumber yard at Collins, Wisconsin, agreeing to faithfully perform his duties as such, to attend to the plaintiff's business, not absenting himself therefrom except through unavoidable circumstances, to perform his duties to the best of his ability and pay over all money received belonging to plaintiff and vouch for the correctness of the accounts made by him, and to keep an accurate record of all his transactions in respect to the business in the plaintiff's books, the service to continue so long as mutually satisfactory, subject to the right of either party to terminate the contract on ten days' notice, the plaintiff to pay for the service $45 per month. In consideration of entering into said contract, February 11th, aforesaid, defendants delivered to the plaintiff a bond promising to pay the latter $1,000, conditioned upon the principal obligee fully performing the obligations of said contract on his part. Breaches of the contract were alleged to have occurred after the giving of the bond, in that *George Barnard* received proceeds of lumber stock sold out of plaintiff's yard to the amount of $201.10 which he failed to pay over to the plaintiff, and received from the latter building material to the value of $834.51 which he failed and refused to account for.

The defendant *George Barnard* answered setting forth, among other things, that the bond was given without consideration a considerable period of time after the making of the contract, to wit, May 6, 1901, and putting in issue all the allegations of the complaint in respect to breaches of the contract. The defendant *Charles A. Barnard* answered, putting in issue the allegation as to the contract having been breached and to the effect that if *George Barnard* was guilty, as alleged in the complaint, the wrongful acts occurred prior to the giving of

the bond and were known to the plaintiff, but were fraudulently concealed for the purpose of inducing said defendant to sign the bond, and that he signed the same relying on the assurance made to him on behalf of plaintiff that *George Barnard's* accounts were correct and his services entirely satisfactory, and that had it not been for such assurance he would not have signed.

The following is a copy of the contract:

"Articles of agreement made and concluded this 11th day of February, 1901, between the *Brillion Lumber Co.*, of Brillion, Calumet county, Wisconsin, and *George Barnard* of the same place, in manner following, to wit:

"The said *George Barnard* covenants and agrees faithfully, truthfully and diligently to act as retail salesman for the said *Brillion Lumber Co.*, at their yard at Collins, Manitowoc county, Wisconsin, from the day hereof, for and during such time as both are satisfied, without absenting himself from the same during which time, unless through unavoidable circumstances it be necessary to do so. If at any time either party desires to annul this contract it shall be the duty of such party to inform the other party of this contract, in writing, at least thirty days in advance, of such desire and intention.

"The said *George Barnard* will attend and do and perform his work during business hours to the best of his ability, and further agrees to pay over all money which may be received by him, arriving from said business, to the said *Brillion Lumber Co.*, vouch for the veracity and correctness of all accounts, in consequence of all transactions and contracts made which shall be duly recorded upon the books of the company; and use due discretion, to the best of his ability and judgment, in extending credit. In consideration of such service, so to be performed, the said *Brillion Lumber Co.* agrees to pay the said *George Barnard* the sum of forty-five ($45) per month.

"In witness whereof, we have hereunto set our hands and seals the day and year above written.

"[Signed] BRILLION LUMBER CO.
"Per Her. Behn. Sec.
"GEO. BARNARD.

"In presence of
"Herman Hehn.
"William Schulz."

The following is a copy of the bond:

"Know all men by these presents, that we, *George Barnard* and *C. A. Barnard,* of the town of Brillion, Calumet Co., Wisconsin, are held and firmly bound unto the *Brillion Lumber Co.,* of the same place, in the sum of one thousand dollars ($1,000) good and lawful money of the United States, to be paid to the said *Brillion Lumber Co.,* their executors, administrators and assigns, to which payment well and truly to be made, we do bind ourselves, our heirs, executors and administrators firmly by these presents.

"Sealed with our seals and dated this 11th day of February, 1901.

"The condition of this obligation is such that if the above bounded *George Barnard,* his executors, administrators or assigns shall in all things stand to and abide by, and well and truly keep and perform the covenants, conditions and agreements mentioned and contained in an instrument of agreement this day entered into by and between him and the *Brillion Lumber Co.* on his the *Geo. Barnard* part, to be kept and performed at the time and in the manner and form herein stated, then the above obligation shall be null and void, otherwise to remain in full force and effect.

"This bond will expire one year from date hereof.

"[Signed] GEO. BARNARD. [Seal.]
"[Signed] C. A. BARNARD. [Seal.]"

The last clause of the bond when it was presented to *Charles A. Barnard* was worded thus: "This bond is to expire with time of service as specified in contract." It was changed to read as indicated in the copy.

A compulsory reference was granted on plaintiff's motion to hear, try, and determine all the issues, except that of fraud in securing *Charles A. Barnard's* signature to the bond, and want of consideration for such signing, which were reserved to be tried by a jury.

On the disputed questions referred as aforesaid the referee found that while *George Barnard* was in plaintiff's employ under the contract he converted to his own use proceeds of sales of lumber, which should have been paid to the plaintiff,

to the amount of $134.81, and disposed of and converted to his own use during the same time building material belonging to the plaintiff to the amount of $502.29, making a total of $637.10, and that before the commencement of the action restitution thereof was demanded of both defendants and refused, and that plaintiff was entitled to judgment accordingly.

Plaintiff's counsel duly moved for a confirmation of the referee's report and defendants' counsel likewise moved for a vacation thereof because the issues were improperly referred, and opposed plaintiff's motion upon exceptions to the findings, which will be referred to so far as necessary in the opinion. Plaintiff's motion was granted, subject to a determination of the issues reserved to be tried by the jury. Thereafter such issues were tried, a verdict being directed in the plaintiff's favor. Before the verdict was so directed the court announced an opinion that the only question for determination was in respect to whether the bond was secured by fraud, misrepresentation, or concealment on the part of the plaintiff or any of its officers or agents. The defendants' counsel asked to have submitted to the jury as material controverted matters the following, in substance: Did *George Barnard* unlawfully appropriate to his own use plaintiff's money as early as April, 1901? Did the plaintiff on or about October 17, 1901, know that *George Barnard* prior thereto had collected money belonging to the plaintiff and unlawfully appropriated the same to his own use? Did the plaintiff on or about October 17, 1901, and until November 18, 1901, pursuant to an agreement with *George Barnard* conceal from *Charles A. Barnard George Barnard's* misconduct as to appropriating plaintiff's money to his own use? Did the plaintiff October 17, 1901, agree with *George Barnard* that the latter should continue in its employ at Brillion, Wisconsin, until by his labor he could repay his indebtedness to the plaintiff? Did *George Barnard* October 17, 1901, enter upon the service indicated and con-

tinue until he was discharged December 3, 1901? The request for the submission of such questions was denied and an answer directed in plaintiff's favor to a question submitted by the court covering the matter in its judgment to be determined, as before indicated. Thereafter judgment was rendered in favor of the plaintiff for the amount specified in the findings of the referee, with interest and costs.

For the appellants there was a brief by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.* They contended, *inter alia,* that "it is the duty of a person taking a guaranty for the good conduct of an employee to disclose the past malpractices of such employee in the course of the business to which the guaranty relates, and that if such duty is not performed the instrument so taken is *ipso facto* invalid. The continuance of an agent in employment is an act so expressive of trust and confidence that it is tantamount to an express declaration to that effect, and hence it must, under usual circumstances, have all the effect of a meditated fraud, if the person so retaining the agent can be permitted to disown the implications inevitably arising from his own conduct." *Sooy ads. State,* 39 N. J. Law, 135, 147; *Krause v. Busacker,* 105 Wis. 350; *Zunker v. Kuehn,* 113 Wis. 421; *Matteson v. Rice,* 116 Wis. 328; *Richmond v. Standclift,* 14 Vt. 258; *Conn. Gen. L. Ins. Co. v. Chase,* 72 Vt. 176, 53 L. R. A. 510; *Bennett v. Judson,* 21 N. Y. 238; *Fishburn v. Jones,* 37 Ind. 119; *Evans v. Keeland,* 9 Ala. 42; *Marchman v. Robertson,* 77 Ga. 40; *Gasconade Co. v. Sanders,* 49 Mo. 192; *Fenter v. Obaugh,* 17 Ark. 71; *Screwmen's Benev. Asso. v. Smith,* 70 Tex. 168; *Guardian F. & L. Assur. Co. v. Thompson,* 68 Cal. 208; *Franklin Bank v. Cooper,* 36 Me. 179; *S. C.* 39 Me. 542; *Page v. Krekey,* 137 N. Y. 307, 21 L. R. A. 409, note.

For the respondent there was a brief by *Nash & Nash,* and oral argument by *E. G. Nash.*

MARSHALL, J. The first proposition advanced for consideration is that the court erred in referring the issues except that respecting the signature of the surety having been fraudulently obtained, and especially that the court erred in referring the issue as to embezzlement and conversion.

Just what the situation was at the time the reference was ordered does not appear. It is recited in the order that the reference was granted on the pleadings and statements of counsel, but what those statements were was not preserved. If the pleadings alone were not sufficient to warrant the reference they may have been amply supplemented by statements in open court. It was proper to consider such statements since no objection was made thereto. But independently thereof it seems that the reference was legitimately within the discretion of the court. Sec. 2864, Stats. (1898), provides that a compulsory reference may be granted "when the trial of an issue of fact shall require the examination of a long account on either side; in which case the referee may be directed to hear and decide the whole issue." So if the essential of a reference existed, *i. e.* the necessity to examine a long account, it was within the court's discretion to refer that only, or that and other issues, or all the issues. How long an account must be to satisfy the statute is very much a matter of judgment on the part of the trial court, but it has been held that twenty or more items are sufficient (*Turner v. Nachtsheim,* 71 Wis. 16, 36 N. W. 637), and that it will do if a long account must be proved by the plaintiff in making out his case, even though the defendant has denied all liability (*U. S. R. S. Co. v. Johnston,* 67 Wis. 182, 30 N. W. 211), and again if the plaintiff's case depends on proving a long account the reference may be granted (*Briggs v. Hiles,* 79 Wis. 571, 48 N. W. 800).

We do not understand that in order to justify a reference the action must be strictly based on the account or for an accounting. The language of the statute clearly indicates

the contrary. If "the trial of an issue of fact shall require the examination of a long account on either side," then, according to the express language of the statute, the reference may be directed either as to the whole issue or any specific question of fact involved. We are unable to find anything in *Andrus v. Home Ins. Co.* 73 Wis. 642, 41 N. W. 956, or *Jordan v. Estate of Warner,* 107 Wis. 539, 550, 83 N. W. 946, restricting the statute within the very narrow limits contended for. True, mere items of damage do not constitute an account, and likewise true there must be an account in the proper sense, and it must be something more than a mere incidental matter. It must be a matter forming substantially the basis of the plaintiff's claim, though the action need not be on the account nor for an accounting. References have been sustained in actions of this nature because of the necessity to examine the principal obligor's account to ascertain the amount of his defalcation and determine the extent of the liability of the surety upon the bond. Such cases are referable because the account is a matter directly involved in the main issue. *Dane Co. v. Dunning,* 20 Wis. 210; *Cairns v. O'Bleness,* 40 Wis. 469; *Andrus v. Home Ins. Co., supra.* So it is sufficient if there is a long account in the proper sense, which is directly, not merely collaterally, involved, so that it must, in the regular course of the trial, necessarily be examined as substantially the basis of the claim for a recovery.

Here the entire claim of the plaintiff was put in issue by the answer. It was clear from the complaint that such claim involved an account of numerous transactions of debit and credit covering over nine months' time. True, much of this when it came to the trial was not disputed, but the state of the pleadings was such that it was incumbent on the plaintiff to prove by evidence the entire account as to lumber sent to the yard and as to sales reported and collections turned in. Each and all of the matters involved were open to dispute under the pleadings. That made, within the authorities, a

good cause for a reference, even without any aid from statements made in open court by counsel showing the extent to which items or matters relating to the account would probably be disputed.

This is the next question in order: Was there sufficient evidence to require submission of the case to the jury on the subject of whether the signature of the surety was fraudulently obtained, in that the principal obligor was then an embezzler of his employer's money, and it was knowingly concealed from the surety, the state of the accounts between the parties being, upon inquiry by the surety, represented to be correct, and the employee's services entirely satisfactory? It is not claimed that there was any evidence to support the allegation that the person who, on behalf of the respondent, presented the bond to the surety for his signature, knowingly made such false representations, but it is insisted that the actual bad faith alleged is not essential to defeat the bond; that misrepresentation through ignorance is sufficient under the rule in respect to inducing a person to purchase property by means of false statements of material facts, affording such person a judicial remedy for his damages regardless of whether the vendor knew such statements to be untrue or not. The cases in this court where the subject has been dealt with are to the effect, only, that when a person at the time of obtaining the signature of the surety knows facts affecting the risk and knows, or has reasonable ground to believe, the latter is ignorant thereof, upon inquiry by the latter of the former he is bound to make a full disclosure. *Ætna L. Ins. Co. v. Mabbett,* 18 Wis. 668, 672; *Remington S. M. Co. v. Kezertee,* 49 Wis. 409, 5 N. W. 809. The reasoning in those cases is well indicated by the following extract from the first one:

"If a representation to this effect is made to the intended surety by one who knows that there is something not naturally to be expected to take place between the parties to the transaction, and that this is unknown to the person to whom he

makes the representation, and that if it were known to him he would not enter into the contract of suretyship, I think it is evidence of a fraudulent representation on his part."

Again it is said in the last case cited:

"If he undertakes to give the information, [he] is bound to disclose every material fact within his knowledge affecting the proposed liability."

Such is the rule as stated in 1 Brandt, Suretyship & G. (3d ed.) § 476, the following language being used:

"If the party who takes a bond for the conduct of a principal in an employment knows at the time that the principal is then a defaulter in said employment and conceals the fact from the surety, such concealment is a fraud upon the surety and discharges him."

True, if false representations are ignorantly made to a proposed surety by the proposed obligee respecting material facts bearing on the proposed risk, under such circumstances that such proposed surety has reasonable ground to believe that they would not be made except from conviction of the truth resulting from diligent investigation, the result is the same as if the obligee has actual knowledge. *Graves v. Lebanon Nat. Bank,* 10 Bush, 23; *Ashuelot Sav. Bank v. Albee,* 63 N. H. 152. We should say in passing that the first case cited has not been followed except in cases where the misleading representation was made directly to the proposed surety. The rule has no application to a mere assertion of an opinion or condition, as in this case, where the error, if error there were, was owing, at the worst, to such inattention, even negligence, as to the conduct of a trusted employee, as is common between annual settlement days. Speaking on this subject in the Law of Suretyship by Stearns at § 106, the author says:

"Fraud will not be imputed because the creditor, by reason of negligence or inattention to his own affairs, does not know of the facts which materially affect the surety risk."

We recognize that there are authorities which *arguendo* at least go further than above indicated, but the better rule, it

seems, and the weight of authority is that something more than mere innocent misrepresentation—misrepresentation through ordinary negligence or the expression of an opinion—is necessary to constitute fraud equivalent to actual fraud so as to discharge a surety.

It may be stated as a rule that upon the proposed obligee in a surety bond being applied to for information by the proposed surety as to the previous conduct of the proposed principal obligor, it is his duty to make full disclosure of all material facts within his knowledge bearing on the risk, and if he fails to do so, or knowingly makes, in response to the inquiry, false representations as to such facts or ignorantly does so, but under such circumstances as would naturally lead the inquirer to believe the representations to be based on an investigation, as, for instance, representations by a director of a bank charged with the duty of investigating the accounts of its cashier, and the proposed surety is induced thereby to sign the bond, he may avoid liability thereon on the ground of fraud; yet an innocent false representation under the circumstances stated, which is the assertion of a mere opinion or the existence of a fact not derived from investigation or made under such circumstances as to suggest such derivation but entertained and made through mere ordinary negligence, is immaterial. Applying that here, we reach the conclusion that the claim of fraud in obtaining the bond was not sustained by the evidence.

The further question of whether, in any event, the plaintiff would be bound by the representations of its employee in obtaining the bond, they not having been specially authorized and not being within the scope of his ordinary duties, we will pass without discussion, but refer on the subject to *Am. S. Co. v. Pauly,* 170 U. S. 133, 18 Sup. Ct. 552. That case would seem to rule the question in favor of the respondent.

Next in logical order is the suggestion that the bond did not take effect as of the date of the contract nor until the delivery, which occurred May 6th after such date, and there is no proof

but what the defalcation, such as occurred, took place before that date. It is not questioned but what when a bond on its face indicates the intention of all parties thereto to be that it shall cover a period commencing prior to the time of the delivery, it will be given effect accordingly, but it is insisted the indications here are to the contrary, in that the bond when first presented for signature ended with "This bond is to expire with time of service as specified in contract," and before it was signed that was changed to the following: "This bond will expire one year from date hereof." We are unable to draw the inference which the learned counsel for appellants do from that circumstance. It seems that the change was made so as to render the period covered by the surety contract certain. The time of the termination of the period was by the change rendered unmistakable, whereas before it was uncertain. The time of its commencement was, by necessary inference at least, fixed by reference to the contract. The term was expressly made one year commencing with the date of the bond. That date was February 11th, the date of the contract. The condition of the bond was for the performance of all the obligations of the contract entered into on such date. That would seem to indicate expressly that the bond was intended to take effect contemporaneously with the date of the contract.

In *Ætna L. Ins. Co. v. Am. S. Co.* 34 Fed. 291, we have a situation very closely analogous to the one before us. The bond was dated June 15, 1884. It was not delivered till July 15th thereafter. A certificate of character of the obligor had been furnished with a blank therein to be filled up with the date of the bond. "June 15, 1884," was written therein. The bond declared that it was made on that date and was in consideration of a premium for the term of twelve months ending June 15, 1885. In that situation the court held that the bond took effect upon its delivery, by relation, as of its date. The rule on this subject may be stated thus: In general a bond

speaks from its date, but upon proof that it was delivered at a later time, the primary presumption is displaced by one that it was intended to take effect from its delivery only, unless by its terms it satisfactorily appears that the parties intended the instrument to take effect from its date or some other time. To that effect are *Supreme Council C. K. v. Fidelity & C. Co.* 63 Fed. 48; *Hatch v. Attleborough,* 97 Mass. 533; *Oregon R. & N. Co. v. Swinburne,* 22 Oreg. 574, 30 Pac. 322; *McIntire v. Linehan,* 178 Mass. 263, 59 N. E. 767; *Hudson v. Miles,* 185 Mass. 582, 71 N. E. 63.

The finding and the special verdict, in view of the foregoing, fully support the judgment contrary to the contention of appellants' counsel. As we have seen, the bond took effect as of date of the contract. It is expressly found that the defalcation occurred during the period commencing with service under the contract and terminating when such service ceased. So we pass this branch of the case without further discussion. Counsel's contention in regard to it seems to be based on the mistaken idea that the bond did not take effect till the date of its delivery and that the defalcation, so far as any occurred, took place, or may have taken place, for aught that appears in the case, between the date of the contract and the time of such delivery.

It stands as a verity in the case that *George Barnard* appropriated to his own use $134.81 which he ought to have paid over to the respondent. That misappropriation is conceded, and the only objections to the judgment in respect thereto have now been ruled in favor of the respondent, except as regards matters claimed to have extinguished the liability after it accrued. Those matters are three in number, none of which were pleaded by the appellants, viz.: (1) The surety was released by reason of the respondent having made a contract with the principal obligor permitting him to repay the money misappropriated by working a sufficient length of time to balance the same with his wages. (2) Duties were imposed on

such obligor not contemplated by the contract, materially increasing the risk of the surety. (3) Respondent prejudicially retained the unfaithful employee in its service after discovering his delinquency, concealing the situation from the surety. They were clearly all defensive matters, required to be specially pleaded in order to entitle the appellants to avail themselves of them. Some evidence in respect to such matters was drawn out before the referee, but it is clear they were not considered within the issues to be tried before him. He was asked to make a finding in respect to one of them and the request was refused. That refusal was excepted to and such exception was sustained upon the hearing before the court on the motion to confirm the referee's report. When the trial of the issue reserved was had counsel for appellants endeavored to introduce evidence to establish the unpleaded defenses, and the same, as a rule, was excluded, the court holding that they were not within the issues presented for trial, and that if appellants desired to have such matters litigated, they not having been pleaded in the first instance, leave to amend should have been requested upon the trial before the referee. Counsel then proposed amendments obviating the difficulty and offered to pay any reasonable terms that might be imposed as a condition of the favor being granted, but no showing was made excusing the failure to bring in the proposed defenses at the first opportunity, or failure to bring them in by proper amendments before the referee. In that situation, upon objection by counsel for respondent, permission to amend the answer as desired was denied. The application was addressed to the sound discretion of the court, and in view of the failure to excuse the delay, as indicated, it is considered that such discretion was properly exercised in respondent's favor. That conclusion renders it unnecessary to consider whether there was evidence establishing the facts claimed by appellants' counsel as to any of such three defensive matters or the legal result that would flow from the ex-

istence of such facts if they were legitimately established in the case.

The remaining important question is this: Is there evidence to sustain the finding as to the shortage in building material of $502.29? There seems to be a fatal defect in the proof as to that matter, in that there was no evidence offered showing the amount of stock on hand at the date of the contract. There was an inventory taken of the stock December 31, 1900, nearly a month and a half before the bond took effect. The correctness of that inventory was fairly established. The shortage claimed was arrived at by adding to the stock as per such inventory all material shipped into the yard thereafter up to November 28, 1901, shown by the invoices sent to *George Barnard* as representing the shipments and deducting therefrom the lumber sold, as indicated by the sales book kept by him, and assuming, without making any allowance for waste or breakage and other causes characteristic of such a business as the same was carried on, that the result indicated the correct amount of stock that ought to be on hand. Such result was then taken from the inventory of November 28th aforesaid, which was fairly verified, and the balance was claimed to be the fraudulent shortage. The referee adopted that view. For aught that appears the entire shortage might have occurred between the date of the first inventory and that of the contract, and again it might be accounted for to a considerable extent by ordinary waste in the operation of the yard.

There was ample proof showing with reasonable certainty that considerable waste during a period of nearly a year would necessarily occur in a lumber yard, as the one in question was operated, by reason of breakage and the substitution of a merchantable board now and then in making a sale for an unmerchantable one, letting the latter go in without making account thereof, and to avoid losing a customer selling lumber of a given length for shorter stuff when the latter was

wanted but was not in stock. Without going into the evidence in detail, showing fully the grounds thereof, serious doubt is entertained by the court as to whether the finding could be sustained, in any event, on account of the referee and the court assuming that the lumber shown to be on hand at one time, with the additions to the stock thereafter made, should exactly balance the sales and lumber on hand nearly a year later, in face of the uncontradicted evidence and common knowledge, we may well say, that there is necessarily considerable waste in such a business. There is quite persuasive evidence in the record other than that in respect to ordinary waste, tending to show how some of the shortage probably occurred entirely consistent with the integrity of *George Barnard,* but as the final conclusion we have reached follows necessarily from a palpable defect in the proof as to the amount of lumber on hand at the date of the contract we will not further discuss the question of whether, aside from that, the finding of the referee could be supported as not contrary to the clear preponderance of the evidence.

Counsel for respondent assumed that the record of the business as conducted by *George Barnard* showed *prima facie,* as against the surety, the amount of lumber received and the sales made. The referee and the court adopted that view. Counsel for appellants insist that the books and records kept by *George Barnard* other than books of account, within the meaning of the statute, properly verified, were mere hearsay evidence as against the surety, and that as the correctness of the invoices purporting to show the additions to the yard was not verified, there was a total failure of proof as to the surety regarding the additions to the stock after the inventory of December, 1900. As to the transactions commencing with work under the contract, the records kept by *George Barnard* of receipts and sales of lumber were evidence against him, and his surety likewise, because that matter was covered by

the contract, in that it required all transactions to be entered upon the books and the correctness thereof to be vouched for by the employee. The rule is that books kept by a principal obligor as part of his duties are evidence against the surety. *Williamsburg City F. Ins. Co. v. Frothingham,* 122 Mass. 391; *Agricultural Ins. Co. v. Keeler,* 44 Conn. 161; *Bricker v. Stone,* 47 Mo. App. 530; 2 Ency. of Ev. 676. But as to the period between December 31, 1900, and February 11, 1901, the invoices and sales book were not evidence against the surety. So the case was left with absolutely no proof of the amount of lumber on hand when the bond was taken.

We are not unmindful of the decision in *Clark v. Wilkinson,* 59 Wis. 543, 18 N. W. 481, to the effect that where a guardian pursuant to an order of court gives a second and additional bond the presumption, in the absence of evidence to the contrary, is that there has been no previous misappropriation. That was based on the facts of that case, particularly those with reference to regular accounting of the guardian and approval of his accounts. Generally speaking, it cannot be presumed in a case of this sort that there has been no defalcation between the date of a settlement made some time prior to the giving of the bond and such time. That is recognized in the case cited. A pretty full discussion of that subject will be found in *Anaheim U. W. Co. v. Parker,* 101 Cal. 483, 35 Pac. 1048.

Trustees of Schools v. Smith, 88 Ill. 181, is quite analogous to the case in hand on the subject under discussion. There a person was his own successor to the office of school treasurer. He gave a new bond at the commencement of his second term. Subsequently he was found to be a defaulter. In a prosecution to recover of his bondsmen it was insisted that proof of the amount of money which he ought to have had in his hands at the commencement of the second term was *prima facie* proof that he had it in fact, and cast upon the bondsmen the

burden of proving the contrary. The court said in respect to the matter:

"The defalcation is established, but the time at which it occurred, whether during the first term or subsequent to the reappointment, does not appear, and we do not see why it may not as well be presumed that the treasurer misappropriated the money during the time of his first term of office as during the time which elapsed after his reappointment."

It may be, as indicated in some of the authorities cited in *Anaheim U. W. Co. v. Parker, supra,* that proof of money or property being in the hands of the principal obligor shortly before the giving of the bond would be some evidence of its being in his possession at the later date, but that could hardly extend to a period of a month and a half, and if it could and the rule were applicable to this case there would still be a failure of proof as to additions to the yard and sales out of the yard in the meantime, because of the sales book and unverified invoices not being evidence against the surety as to the period before the date of the contract.

It is the opinion of the court that on account of the fatal infirmity in the proof, as above indicated, the judgment respecting the shortage in building material must be reversed. If a reasonable probability were apparent that the failure of proof might be supplied the court would be inclined to remand the case for a further hearing, but since it seems the condition is otherwise, and counsel for appellants freely admitted on the argument that all the proof was produced before the referee which was obtainable, it is considered that the litigation should be terminated with this hearing. The counsel evidently presented the case of the respondent in the most favorable aspect the evidence discovered, or reasonably discoverable, would permit. Therefore, to prolong the litigation would only cause needless expense upon both sides.

By the Court.—The judgment as to the allowance for shortage in building material is reversed. As to the costs

taxed in the court below of $101.01, and the shortage in money received for lumber sold, $134.81, with interest on the latter from the time of the commencement of the action up to the time of the rendition of the judgment appealed from, such judgment is affirmed as of its date.

CASSODAY, C. J., took no part.

WILLIAMS, Appellant, vs. KIMBERLY & CLARK COMPANY, Respondent.

March 20—April 9, 1907.

Master and servant: Injury from incompetence of fellow-servant: Pleading: Assumption of risk: Reliance on promise to remove: Reasonable time.

1. In an action for personal injury alleged to have been caused by incompetence of a common laborer, plaintiff's fellow-servant, a complaint showing that plaintiff had continued in defendant's service, exposed to the known risk from such incompetence, for ten days after defendant had promised to replace the laborer by a competent person, does not necessarily show that such time was so unreasonably long for the substitution of another laborer that plaintiff must be deemed to have assumed the risk. Facts to show that the time was not unreasonable might be given in evidence, though not pleaded.
2. An allegation that defendant negligently continued the laborer in the service after the promise to remove him should not be construed as showing that the ten days was an unreasonable time, since a master's failure to remove an incompetent employee at once is negligence in the sense, at least, of being conduct subjecting him to liability to other employees.
3. The rule justifying an employee in temporary exposure to known risk upon the employer's promise to remove the danger applies to risks arising from the incompétence of fellow-servants as well as to those from dangerous machinery; and no distinction is made between fellow-servants using complicated and dangerous machinery and those using simple tools and implements or none at all.

[4. Whether a promise to repair is any less effective to relieve a workman from assumption of risk from a simple tool than in case of complicated ones, not decided.]

5. Facts alleged in the complaint in this case as to the incompetence of plaintiff's fellow-servant and his negligence in throwing blocks of wood into a rack from which plaintiff took them to put them into a barking machine, are *held* not to show that the risk of being struck and injured by blocks so thrown was so obvious, imminent, momentary, constant, and unavoidable that no reasonably prudent person would expose himself to it even temporarily; and on demurrer, therefore, the case cannot be held to be within the exception to the rule justifying plaintiff in remaining at work for a reasonable time in reliance upon the employer's promise to remove the incompetent fellow-servant.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

The appeal is from an order sustaining demurrer to a complaint setting forth a cause of action for personal injuries to the plaintiff, an employee of the defendant, resulting from the incompetence and negligence of a fellow-servant. The complaint sets forth that the plaintiff was engaged in putting blocks of wood into a barking machine, which process engrossed his attention closely; that it was the duty of another employee, known as a block piler, to cast the blocks of wood into a rack placed near the barking machine so as to be convenient to plaintiff's hand; that the block piler at the time in question was one Van Haund, a Hollander, who is alleged to have been incompetent by reason of being careless and reckless in not taking sufficient time to place the blocks in the rack, but, on the contrary, was accustomed to throw them carelessly upon and into said rack so that they frequently came over the same, endangering the plaintiff while engaged in his work. It is specifically alleged that the barking machine engrossed plaintiff's attention so that he could not perform his work and watch the block piler at the same time or know that there was danger of being struck by a negligently

thrown block so as to avoid the same. Also, that Van Haund understood no English and the plaintiff no Dutch, so that he could not expostulate with or give directions to the piler. It is further alleged that the defendant, well knowing the ignorance and incompetence of the block piler, continued him in his employ until, on the 3d day of February, by his negligence of the kind described, a block of wood was thrown over and against the plaintiff when engaged in his work and he received serious injury. It is further alleged that prior to the time of injury plaintiff had repeatedly protested to the master against the incompetence of this block piler, explaining the characteristics of such incompetence and the character of the peril therefrom, and that, especially about ten days prior to the injury, he had "entreated" that the block piler be discharged and a competent one employed; that thereupon the defendant, by its foreman, agreed that it would discharge the block piler and would employ a competent person to act, whereupon plaintiff, relying upon such promises and believing they would be fulfilled and a competent person employed, remained in his employment until the day of the injury. Other averments generally necessary to the cause of action are not involved in the discussion and need not be stated. The defendant demurred to this complaint on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained by order July 21, 1906, from which plaintiff appeals.

For the appellant the cause was submitted on the brief of *Classon & Frank.*

For the respondent there was a brief by *Vilas, Vilas & Freeman,* and oral argument by *C. A. Vilas.*

DODGE, J. 1. The first ground of attack upon the complaint is predicated upon the contention that on its face it shows that the plaintiff continued his exposure to the known risk from his fellow-servant's incompetence and negligence

for more than the time reasonably necessary to enable the master to perform its promise to substitute a competent and careful workman. The law on this subject is in no wise in dispute. The employee is relieved from his ordinary assumption of the risks of his fellow-servant's negligence upon the master's promise to remove that danger only for a time reasonably required to perform that promise. *Heathcock v. Milwaukee-Platteville L. & Z. M. Co.* 128 Wis. 46, 107 N. W. 463; *Coolidge v. Hallauer,* 126 Wis. 244, 105 N. W. 568; *Erdman v. Ill. S. Co.* 95 Wis. 6, 69 N. W. 993; *Ferriss v. Berlin M. Works,* 90 Wis. 541, 63 N. W. 234; *Stephenson v. Duncan,* 73 Wis. 404, 41 N. W. 337. When such reasonable time has expired the master's promise is broken to the knowledge of the employee, and he can no longer be considered as relying thereon. What such reasonable time may be will, of course, vary very much with the circumstances. An engineer or a head sawyer in a sawmill, remote from settlement, might be much more difficult to replace with a competent substitute than a mere common laborer in a vicinity where laborers were numerous; or the defect in a machine might be of such character as to necessitate sending for new parts to a remote place of manufacture. Hence, ordinarily, the question is one for the jury. Nevertheless, the situation presented may be so clear that reasonable minds could not differ with reference to the inference from all the circumstances, and in such case it may well be the duty of the court, with all the facts before it, to hold as matter of law that the reasonable time has been exceeded. This we did in the recent case of *Heathcock v. Milwaukee-Platteville L. & Z. M. Co., supra,* where it was held that seven days, under the circumstances there presented, transgressed the reasonable time necessary to guard the mouth of a mine by a railing. Upon the authority of that case there could be little doubt that ten days exceeded the time required either to procure a common laborer in the place of the one whose incompetence was complained of or to substitute some

other common laborer already in defendant's employ, in the absence of very clear showing of serious obstacles to so doing. But it is not at all essential to good pleading that the evidence of such excuse, if any there be, should be pleaded, hence the failure of such facts to appear in the complaint does not necessarily negative their existence; and, while we confess that it is difficult to conceive of any circumstances which could protract for so long a period the time requisite, we are not prepared to say that none could exist, and therefore must hold that the mere allegations of the complaint, construed of course with broad liberality in favor of the cause of action, do not necessarily show that the ten days' period in question was unreasonable.

Our attention is urged to *Stephenson v. Duncan,* 73 Wis. 404, 41 N. W. 337, where it was held that the complaint itself showed a similar period of ten days to be unreasonable for protecting a dangerous saw. That case, however, turned upon an express allegation of the complaint that, before the injury and after the promise to repair, the defendant had ample time and opportunity to make the repair but neglected to do so. Indeed, the court expressly said that but for such allegation it could not be said, as matter of law, that ten days was so unreasonable a period as to exclude expectation that the defendant would make good his promise to repair. In the complaint before us we find no such allegation, except, perhaps, that the defendant negligently continued the block piler in its employ after said promise to remove him. We cannot say that this allegation must be construed as denying plaintiff's cause of action. It must be remembered that the master owes the duty of immediate removal of an incompetent employee whenever he acquires knowledge of such incompetence; hence he is guilty of negligence in failing so to remove, in the sense at least of conduct subjecting him to liability to other employees. *Kamp v. Coxe Bros. & Co.* 122 Wis. 206, 219, 99 N. W. 366.

2. Certain other radical grounds of attack upon the complaint are presented, though not with perfect clarity as to either the principle contended for or their application to the situation. One of these positions taken by the trial court, and apparently still sought to be sustained by respondent, is thus stated by the trial court:

"That the rule where the danger is known and appreciated by the servant, and he remains in the employment upon the promise of the master to remedy, he does not assume the risk, applies only in cases of dangerous machinery where the master is presumed to have a better knowledge of the danger than the servant. In other words, that it has no application to ordinary labor which requires only the use of implements with which the servant is as familiar as the master. This seems to be a tolerably well-settled rule according to the authorities."

If by this is meant that the rule justifying an employee in temporary exposure to known risk upon employer's promise to remove the danger has no application except to risks from dangerous machinery, it is directly antagonized by several of our own decisions, holding that it does apply to risks arising from incompetence of fellow-servants which, but for such promise, the employee would be held to assume. *Maitland v. Gilbert P. Co.* 97 Wis. 476, 485, 72 N. W. 1124; *Curran v. A. H. Stange Co.* 98 Wis. 598, 606, 74 N. W. 377; *Kamp v. Coxe Bros. & Co.* 122 Wis. 206, 99 N. W. 366. True, there is an expression of doubt whether it applies to a defective place of work, such as a caving ditch, in *Showalter v. Fairbanks, M. & Co.* 88 Wis. 376, 382, 60 N. W. 257, but no attempt at decision to that effect was there made. That doubt would seem to have been resolved in favor of the application of the rule in *Yerkes v. N. P. R. Co.* 112 Wis. 184, 88 N. W. 33, where it was applied to a place of work rendered unsafe by a slanting footboard, and in *Heathcock v. Milwaukee-Platteville L. & Z. M. Co.* 128 Wis. 46, 107 N. W. 463, where the danger arose from an unguarded excavation in proximity to plaintiff's place of work. The argument against the liability of a

master pending a promise to repair or remove the danger that the peril is open and obvious and as well known to the servant as the master indicates complete oversight of the real principle involved. Such fact indeed leads in some cases to a presumption that the servant assumes the risk in absence of protest, but the very principle at the foundation of the rule now under consideration is that the servant rebuts that presumption by a protest and reliance on the master's promise to remove the peril; which assumes, to start with, that the danger is open and obvious, at least to the servant, or he would have no reason to protest. To hold that a rule which in its very nature can have no application unless the danger is obvious does not apply where it is obvious, is a contradiction in terms, and the negation of the existence of any such rule. The true principle is that a servant may, and in law is presumed to, assume a risk of which he has knowledge, but that he avoids such assumption if he protests and is induced by the master's promise to remove the danger to incur that risk for a time reasonably requisite for its removal. It is not at all bottomed upon any assumed superiority of knowledge in the master, as is the general duty to furnish reasonably safe tools and appliances (*Stork v. Chas. Stolper C. Co.* 127 Wis. 318, 322, 106 N. W. 841), but upon the right of the employee to refuse to assume the risk of a peril which he knows as well, or even better, than his employer. Obviously there is no distinction in reason because the danger results from the incompetence of a fellow-servant using complicated and dangerous machinery instead of simple tools and implements, or none at all. The peril from negligence in swinging a sledge or a pick is as much, and no more, assumed than if he were running a saw or an engine. The co-employee has as much right to refuse to submit to the one peril as to the other, and may as well be induced to continue by promise of speedy removal of the incompetent fellow-servant. Indeed, the simplicity of the operation would seem to enhance the probability that he might

do so consistently with reasonable care. Thorough search discloses no authority for any distinction between such cases. The respondent's citations all refer to promised repair of tools, appliances, or place of labor and not to removal of incompetent fellow-servants. Whether a promise to repair is any less effective to relieve a workman from assumption of risk from a simple tool than in case of complicated ones has not been decided in Wisconsin and need not be now, for the question is not presented. We are convinced that no distinction in that respect exists between different incompetent fellow-servants by reason of the relative simplicity or complexity of the work in which they are engaged.

There is of course an exception to the rule we have been discussing where the peril of injury is so obvious, imminent, momentary, and constant, and so unavoidable by any precaution, that no reasonably prudent person would expose himself to it even temporarily. *Erdman v. Ill. S. Co.* 95 Wis. 6, 13, 69 N. W. 993; *Maitland v. Gilbert P. Co.* 97 Wis. 476, 72 N. W. 1124; *Curran v. A. H. Stange Co.* 98 Wis. 598, 74 N. W. 377; *Jensen v. Hudson S. Co.* 98 Wis. 73, 81, 73 N. W. 434; *Yerkes v. N. P. R. Co.* 112 Wis. 184, 192, 88 N. W. 33; *Coolidge v. Hallauer,* 126 Wis. 244, 249, 105 N. W. 568. This is really the point decided in several of the foreign cases cited by counsel which dwell upon the open and obvious character of the peril. It is hardly contended that the facts stated in the complaint bring plaintiff within this exception as matter of law. We are clear that under this complaint facts may appear fairly supporting an inference that an ordinarily prudent person might reasonably believe that, temporarily, he could, by special watchfulness and caution, escape injury from the negligence of his fellow-servant in piling blocks in the adjoining rack. Indeed, the fact that the plaintiff did escape for so long a period as ten days is not without weight on that subject. *Maitland v. Gilbert P. Co., supra; Yerkes v. N. P. R. Co., supra.*

Our conclusion is that the direct allegations of the defendant's negligence and plaintiff's freedom from contributory negligence are not so conclusively refuted by other facts appearing in the complaint that proof admissible thereunder might not sustain a cause of action.

By the Court.—Order sustaining demurrer is reversed, and cause remanded for further proceedings.

CASSODAY, C. J., took no part.

J. C. LEWIS COMPANY, Appellant, vs. ADAMSKI, Respondent.

March 20—April 9, 1907.

Municipal courts: Action on judgment: Limitations: Pleading.

1. The municipal court for Langlade county, created by ch. 96, Laws of 1891, is not a justice's court nor a court of record, but is a municipal court under sec. 2, art. VII, Const.; and an action upon its judgment is barred, under subd. 1, sec. 4222, Stats. (1898), after six years from the rendition thereof.
2. Where a transcript of a judgment of said municipal court has been filed and docketed with the clerk of the circuit court as authorized by said act of 1891, an action upon the judgment so docketed is, by secs. 2900, 2902, Stats. (1898), barred after ten years from the date of its rendition.
3. In an action upon a judgment of the municipal court for Langlade county the answer alleged the date of the rendition of the judgment and the date of the filing of a transcript with the clerk of the circuit court. It also alleged that more than ten years had elapsed between the entering of said judgment and the commencement of the action thereon. It then alleged that the action was barred by subd. 1, sec. 4222, Stats. (1898). *Held*, that defendant was entitled to rely upon the ten-year limitation under secs. 2900, 2902.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

On January 14, 1895, plaintiff obtained judgment for $172.84 against defendant in the municipal court for Langlade county. No part thereof has been paid except $25. The answer admits that the judgment was so obtained, and alleges that a transcript of the judgment was filed on or about March 11, 1897, with the clerk of the circuit court for Langlade county and that the judgment was then docketed in the circuit court. The answer contains the following allegation: "Third. That more than ten years have elapsed between the entering of said judgment and the commencement of this action;" and the further allegation that the action is barred by sec. 4219 and subd. 1, sec. 4222, Stats. (1898). It is also alleged that another action is pending between the same parties covering the same subject of action. The place of trial was changed to Winnebago county. The cause was tried before the court upon a stipulated statement of facts and judgment awarded for defendant. This is an appeal from such judgment.

For the appellant there was a brief by *Goodrick v. Goodrick,* and oral argument by *A. B. Goodrick.*

For the respondent the cause was submitted on the brief of *E. A. Morse.*

SIEBECKER, J. Whether the judgment of the municipal court is to be deemed a justice's court judgment depends upon the character of the municipal court wherein it was rendered. The act creating this court provides that it shall be a municipal court for Langlade county, and that the judge shall be elected by the people of the county for four years, and that no one shall be elected to such office unless he be a duly licensed attorney at law. The jurisdiction conferred extends beyond that of justices of the peace, in that civil actions may be brought in the court wherein the damages or value of the property in controversy does not exceed the sum of $500. It is also vested with jurisdiction to try all appeals in civil ac-

tions from justices of the peace, and the act prescribes how they may be brought to trial and prosecuted upon notice or dismissed upon the conditions specified. The judge of this court is also given power to set aside verdicts, grant new trials on payment of the costs, or on such conditions as to costs as justice requires; he may modify and reverse the judgments and orders of said court or the judge thereof, or do any act or thing which circuit courts may do during trial terms, being governed therein by the general law and practice of the circuit courts as nearly as may be, where the rules of law of justices' courts are inadequate or do not apply. From this it is obvious that the court is given powers and jurisdiction in excess of those possessed by justices of the peace, and this clearly indicates that the municipal court is not a justice's court but is a municipal court under sec. 2, art. VII, Const. However, it is not a court of record, for no provision is made for a clerk of this court, and the provision for a seal does not make it obligatory on the judge to provide one; thus two essentials which are deemed important features of a court of record are omitted. It is manifestly not a justice's court nor a court of record, but is a municipal court exercising the powers and jurisdiction specially conferred upon it by the legislature.

It is claimed that no statute of limitation is pleaded except those specified in the fourth paragraph of the answer, namely, sec. 4219 and subd. 1, sec. 4222, Stats. (1898). The pleadings of both parties allege the date of the rendition of the judgment sued on, and the answer, in addition to alleging the date of the filing of the transcript with the clerk of the circuit court, contains the following allegation:

"Third. That more than ten years have elapsed between the entering of said judgment and the commencement of this action."

This separate allegation, in connection with the other facts alleged in the answer, indicates that reliance was placed on

such allegation, and it was evidently inserted for no other purpose than to inform the plaintiff of the claim that the ten-year limitation within which this action could be brought had expired and that the action was barred. Such a defense is sufficiently pleaded if the facts alleged constitute a bar and indicate with reasonable certainty that it is claimed as a defense. We think this answer meets both these requirements and that defendant was entitled to rely on it. The specification in the fourth paragraph of the answer, that the action is barred by sec. 4222, does not indicate that defendant did not rely on the ten-year limitation statute covered by the preceding third allegation, and cannot operate to preclude him from standing on this defense if it applies to the facts of the case. If the judgment sued on be regarded as the judgment of this municipal court, then it is embraced within the class of judgments covered by the first subdivision of sec. 4222, Stats. (1898), as a judgment of a court not of record, and an action on it became barred at the expiration of six years from the rendition of the judgment.

It however appears that a transcript of this municipal court judgment was filed with the clerk of the circuit court on March 11, 1897. The statute creating this court provides:

"Transcripts of judgments of the municipal court may be filed and docketed with the clerk of the circuit court for said county with the same effect as may be transcripts of judgments rendered by justices of the peace of said county."

Sec. 2900, Stats. (1898), authorizes the filing of transcripts of such judgments with the clerk of the circuit court and directs the docketing thereof in the docket of the court in the manner prescribed for docketing circuit court judgments, and provides:

"Every such judgment, from the time of such filing of the transcript thereof, shall be deemed the judgment of the circuit court, be equally under the control thereof and be carried into execution, . . . in the same manner and with like effect

as the judgments thereof, except that no action can be brought upon the same as a judgment of said court nor execution issued thereon after the expiration of the period of the lien thereof on real estate provided by section 2902."

This lien is limited to a period of ten years from the date of the rendition of the judgment. If, then, this action be treated as one on this judgment so docketed in the circuit court, it is obvious that it was not commenced within the period prescribed in the foregoing statute and it was barred after ten years from the date of its rendition. See *Sullivan v. Miles,* 117 Wis. 576, 94 N. W. 298.

From the foregoing it is manifest that the cause of action was barred before suit was commenced, and that the circuit court properly awarded judgment dismissing the complaint.

By the Court.—Judgment affirmed.

CASSODAY, C. J., took no part.

HUGHES, Appellant, vs. THOMAS and others, Respondents.

March 20—April 9, 1907.

Subrogation: Advances to pay off incumbrance: Defective security: Laches: Limitation of actions: Mortgages: Extension of time by partial payment.

1. **One who advances money to pay off an incumbrance upon property under an agreement that he is to have security thereon will not be regarded as a mere volunteer, but will be subrogated to the rights of the original incumbrancer if his own security turns out to be defective and there are no intervening equities.**
2. **The widow of a testator was given a life estate in land and became executrix of the will. The personal estate was insufficient to pay debts, and in order to obtain money to pay off an overdue mortgage on the land she gave to another person a new mortgage which was intended and understood to cover the fee and not merely her life estate. No equities having intervened,**

the new mortgagee is *held* entitled to be subrogated to the rights of the original mortgagee. *Conner v. Welch*, 51 Wis. 431, and *Watson v. Wilcox*, 39 Wis. 643, distinguished.

3. The right to subrogation in such a case is not barred by mere delay short of the statutory period of limitation, in the absence of an equitable estoppel, no rights of third persons being prejudiced by the delay.

4. Payment of interest upon a past-due note secured by mortgage extends the time within which, under sec. 4220, Stats. (1898), an action may be brought to foreclose the mortgage to twenty years from the date of such payment.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

This is an appeal from an order sustaining a demurrer to the plaintiff's complaint. The complaint alleges, in substance, that one John S. Thomas and Ann Thomas, his wife, on the 30th day of October, 1876, executed and delivered to one John E. Williams their promissory note in writing, by which, for value received, they promised to pay said John E. Williams, or order, four years after date, $400 with interest at eight per cent. per annum, payable annually; that to secure said note they did at the same time execute under their hands and seals and deliver to said John E. Williams a mortgage upon the E. ½ of the S. W. ¼, sec. 13, town 17, range 15 E., which mortgage was in the usual form, and provided for the payment of $50 solicitor's fees in case of nonperformance of any of the conditions thereof, which mortgage was duly executed, witnessed, acknowledged, and recorded in the office of the register of deeds of Winnebago county, in which county said land is situate, on the 30th day of October, 1876; that on August 2, 1893, John S. Thomas died seised of said property, leaving a will duly admitted to probate November 14, 1893, wherein Ann Thomas was named as executrix, and letters testamentary issued to her on November 14, 1893; that by the terms of the will said real estate was left to Ann Thomas during her life, and at her death to go in equal shares to *David E. Thomas, Evan J. Thomas,* and *John R. Thomas,*

sons, *Margaret E. Holdren, Mary Ida Gooseman, Hannah Maria Wiley,* daughters, and *John R. Ellis* and *Sarah J. Ellis Evans,* grandchildren; that the defendants *David E. Thomas, Evan J. Thomas, John R. Thomas, Margaret E. Holdren, Mary Ida Gooseman, Hannah Maria Wiley, John R. Ellis,* and *Sarah J. Ellis Evans* are the said heirs and devisees of John S. Thomas, deceased, the defendant *Mrs. David E. Thomas* being the wife of defendant *David E. Thomas, Mary Thomas* the wife of defendant *Evan J. Thomas,* and *Mary Ellis* the wife of defendant *John R. Ellis;* that so far as the action relates to *Margaret E. Holdren, Mary Ida Gooseman, Hannah Maria Wiley,* and *Sarah J. Ellis Evans* it concerns their separate property; that the personal property left by John S. Thomas was insufficient to pay funeral expenses and unsecured debts; that the interest on said indebtedness was paid to John E. Williams by John S. Thomas whenever due.

The complaint then alleges that in 1898, the mortgage being due and John E. Williams pressing for payment, Ann Thomas, widow of John S. Thomas, and executrix, solicited from Owen J. Hughes a loan to be used solely and entirely to pay said note and mortgage; that in consideration of said loan Ann Thomas represented and promised to Owen J. Hughes that she would deliver to him security for the payment of said loan which should bind and be a lien upon the mortgaged property; that relying upon such representations and promises Hughes did, at the solicitation of Ann Thomas and upon her promises to secure the repayment thereof, and not in self-interest but solely in kindness, on the 10th day of October, 1898, loan to Ann Thomas $400, which sum was on the 10th day of October, 1898, in pursuance of the representations and agreements, paid by Ann Thomas to John E. Williams, who on said 10th day of October, 1898, released and discharged of record the mortgage hereinbefore referred to; that in pursuance of the agreements aforesaid Ann Thomas on the 10th day of October, 1898, executed and delivered to Owen

J. Hughes her promissory note, wherein she promised to pay to Hughes or his order, five years after date, $400, with interest at five per cent., and executed and delivered to Hughes a mortgage upon the property in question and hereinbefore described to secure the payment of said note, which mortgage was in the usual form, said Ann Thomas covenanting in said mortgage to pay $30 solicitor's fees in case of foreclosure; that the mortgage was duly executed, acknowledged, and recorded in the office of the register of deeds of Winnebago county on the 10th day of October, 1898; that the interest on said note was paid up to the 10th day of October, 1901, by Ann Thomas; that on December 12, 1902, said mortgage and indebtedness represented thereby was for value received assigned by Owen J. Hughes to the plaintiff.

The complaint further alleges that Ann Thomas was not on the 10th day of October, 1898, the owner of the property and had no authority to mortgage the premises, and that said mortgage is invalid; that the proceeds of the promissory note for which said mortgage was given were used expressly for the benefit of the estate of John S. Thomas, being used to pay a debt of the said estate; that Ann Thomas died March, 1902, and left no property out of which the claim of plaintiff can be collected; that no proceedings have been had at law or otherwise to recover the sum secured by the note and mortgage, and that no part thereof has been paid or collected.

The complaint prays that the amount due the plaintiff be adjudged and be a lien against the premises; that the first-named mortgage be revived to the amount of the sum loaned by Owen J. Hughes, and that the plaintiff be subrogated to the rights of the mortgagee; that the satisfaction of said mortgage be canceled, and plaintiff's claim be adjudged to be secured by said mortgage, and the defendants, or persons claiming under them, be barred and foreclosed of all right in the property; and for general relief.

The defendants demurred upon the following grounds: (1) That the action was not commenced within the time lim-

ited by sec. 4220, Stats. (1898); (2) that the action was not commenced within the time limited by sec. 4222, Stats. (1898); (3) that said complaint does not state facts sufficient to constitute a cause of action.

C. D. Cleveland, Jr., for the appellant.

Charles H. Forward, for the respondents.

KERWIN, J. The right of subrogation exists independently of contract and is equitable in its nature. It is a means by which justice may be accomplished by subrogating one party to the rights of another in accordance with the recognized principles of equity jurisprudence. Sheldon, Subrogation, §§ 1–4; *Charmley v. Charmley*, 125 Wis. 297, 103 N. W. 1106. There can be no doubt that in the case before us the life tenant, having an interest in the property covered by the mortgage, could have paid the mortgage in order to protect her interest, and upon such payment would have the right to be subrogated to the interest of the mortgagee, the object being to do substantial justice independent of form or contract relation between the parties to be affected by the subrogation. Sheldon, Subrogation, §§ 1, 4, 7, 12; *Charmley v. Charmley, supra*, and cases cited. The claim of plaintiff upon the facts admitted by the demurrer is based mainly, if not wholly, upon the relations arising between Hughes and Ann Thomas, the life tenant, by virtue of the transaction resulting in the loan by Owen J. Hughes to Ann Thomas and the execution and delivery by her to Hughes of the second mortgage. It appears from the record that the court below arrived at the conclusion, substantially, that upon the allegations of the complaint Owen J. Hughes got a mortgage upon the life interest of Ann Thomas only, and that it must be presumed that Hughes took the mortgage with knowledge of the state of the title, and, if he did not have knowledge, both he and his assignee, the plaintiff, were guilty of gross negligence in not ascertaining the facts; that, assuming Ann Thomas agreed to give a mortgage on the fee, such mortgage did not bind the

owners of the fee, and Hughes was a mere volunteer. There is considerable force in the position of the trial judge and the reasons advanced for his decision, and we should be better pleased had the pleader set up more specifically the facts going to show that Hughes understood that he was getting a mortgage upon the fee and not upon the life interest of Ann Thomas. But we are forced to the conclusion that upon a liberal construction of the complaint it is capable of the construction that Ann Thomas intended to give and Hughes to receive a mortgage upon the fee to the extent, at least, of giving Hughes all the rights of the original mortgagee, whose mortgage was paid with the money loaned by Hughes upon the property. The mortgage to Hughes recited that it should "bind and be a lien upon said property," and it is reasonable to suppose that the parties intended it to cover the fee. It can hardly be said that Hughes would loan that amount of money upon a life interest which might be terminated at any time and leave him without security. This is not the way prudent men ordinarily do business. The agreement of the life tenant and executrix to give a mortgage on the fee, and the execution and delivery of it and payment of the original mortgage with the money, would bind the fee to the extent of subrogating Hughes or his assignee to the interest of the original mortgagee. *Levy v. Martin,* 48 Wis. 198, 4 N. W. 35; *Morgan v. Hammett,* 23 Wis. 30; *Lashua v. Myhre,* 117 Wis. 18, 93 N. W. 811; *Blodgett v. Hitt,* 29 Wis. 169; *Bolman v. Lohman,* 74 Ala. 507; *Payne v. Hathaway,* 3 Vt. 212; *Crippen v. Chappel,* 35 Kan. 495, 11 Pac. 453. It seems to be well settled, and we think on sound principles, that where the security given for the loan which is used to pay off an incumbrance turns out to be void, although the party taking it expected to get good security, he will be subrogated to the rights of the holder of the lien which the money advanced is used to pay, and that in such case the party advancing the money cannot be regarded as a stranger or volunteer. This doctrine is recognized in the cases in this court heretofore cited. The

rule is that one who advances money under a contract that he is to be secured on the property for the benefit of which the money is advanced is entitled to subrogation though it turns out that his security is defective or void. He is not regarded under such circumstances as a mere volunteer. *De Concillio v. Brownrigg,* 51 N. J. Eq. 532, 25 Atl. 383; *Everston v. Central Bank,* 33 Kan. 352, 6 Pac. 605; Sheldon, Subrogation, § 20. In the case before us, since we hold that the allegations of the complaint are sufficient on demurrer to show Hughes a *bona fide* holder of security which he understood to be on the fee and which it was agreed should bind the fee, he cannot be held a volunteer or intermeddler. The doctrine of subrogation, rightly applied, is calculated to promote the ends of justice through courts of equity where the law is powerless to award relief and justice is promoted by the enforcement of the remedy and no one is injured. Where, as here, under the allegations of the complaint, the money was raised to pay the prior mortgage and was applied for that purpose, the new mortgage given for the same amount as the old, with a smaller solicitor's fee and rate of interest and no intervening rights or prejudice worked to any one, and both the life tenant and executrix, as well as the mortgagee, understanding that the mortgage covered the fee, it is contrary to the general current of authority to deny subrogation. On this question, in addition to the cases heretofore cited, we call attention to the following: *Motes v. Robertson,* 133 Ala. 630, 32 South. 225; *Gans v. Thieme,* 93 N. Y. 225; *Ft. Jefferson I. Co. v. Dupoyster,* 112 Ky. 792, 66 S. W. 1048; *Denton v. Tyson,* 118 N. C. 542, 24 S. E. 116; *Woolley v. Pemberton,* 41 N. J. Eq. 394, 5 Atl. 139; *Acer v. Hotchkiss,* 97 N. Y. 395; *Heuser v. Sharman,* 89 Iowa, 355, 56 N. W. 525; *Wilkins v. Gibson,* 113 Ga. 31, 38 S. E. 374; *Rachal v. Smith,* 101 Fed. 159, 42 C. C. A. 297; *Home Sav. Bank v. Bierstadt,* 168 Ill. 618, 48 N. E. 161; *Suydam v. Voorhees,* 58 N. J. Eq. 157, 43 Atl. 4.

The court below, in sustaining the demurrer, relied upon

Conner v. Welch, 51 Wis. 431, 8 N. W. 260, and *Watson v. Wilcox,* 39 Wis. 643. *Conner v. Welch* is quite different in its facts from the case before us, for the reason that in that case the rights of a third party intervened. *Watson v. Wilcox* is distinguishable from the instant case. There the plaintiff was a stranger or volunteer and got what he bargained for. The case is considered in connection with other Wisconsin cases in *Everston v. Central Bank,* 33 Kan. 352, 6 Pac. 605.

Nor do we think upon the allegations of the complaint that laches can bar the rights of plaintiff. No rights of third parties have intervened who are prejudiced by the delay, so far at least as the case stands upon demurrer. In the absence of an equitable estoppel the ordinary rule is that nothing short of the statutory period of limitation will bar the right. Each case must stand upon its own facts, and, while a few years may be sufficient in some cases to bar a right of action, a long period of time in others will not have that effect. *Rogers v. Van Nortwick,* 87 Wis. 414, 428, 58 N. W. 757, and cases cited in opinion. As said in *Fleming v. Ellison,* 124 Wis. 36, 43, 102 N. W. 398:

"All the cases proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the property or parties."

It is further contended that the plaintiff is entitled to subrogation because Ann Thomas, upon payment of the Williams mortgage, was entitled to subrogation, and when she mortgaged her interest to Hughes her mortgage passed this right to Hughes, and that plaintiff is entitled to all the rights of Ann Thomas in the land in question, which include the right to avail herself of the Williams mortgage. But whether the complaint is sufficient to make such a case we shall not determine, but prefer to rest our decision upon the grounds heretofore stated.

The only remaining question is the statute of limitation. The court below held the statute of limitation no bar to the action, and we agree with that conclusion. The contention of counsel for respondent is that the debt was barred under sec. 4222, Stats. (1898), and suit upon the mortgage under sec. 4220. The question is whether the present action was barred by sec. 4220, Stats. (1898), which provides for a twenty-year limitation. It is insisted by respondent that since the debt was barred and extinguished under sec. 4222, which provides a six-year limitation upon the debt in question, the right of action was also barred on the mortgage at the expiration of twenty years from the time the right of action accrued to foreclose the mortgage. Interest was paid upon the indebtedness up to October 30, 1892. But it is insisted that the payment of interest upon the debt did not have the effect of extending the twenty-year limitation upon the mortgage. It is well settled that the remedy upon the mortgage to enforce the lien may be enforced after the debt is barred. But the question here is whether payment of interest on the debt had the effect of extending the time for commencement of action to enforce the lien under the mortgage for twenty years from time of such payment; in other words, that part payment interrupted the running of the statute on the mortgage. It is well settled that payment of interest interrupts the running of the statute upon the debt. *Lyle v. Esser,* 98 Wis. 234, 73 N. W. 1008; *Engmann v. Estate of Immel,* 59 Wis. 249, 259, 18 N. W. 182; 19 Am. & Eng. Ency. of Law (2d ed.) 327; *Taylor v. Perry,* 48 Ala. 240; *Barron v. Kennedy,* 17 Cal. 574. But it is strenuously insisted by counsel for respondent that, since the debt was barred and extinguished at the time this action was commenced, the twenty-year limitation on the mortgage should begin to run not from time of last payment of interest, but from the time the right to foreclose accrued. The authorities seem to be against respondent's contention. The insistence of respondent is that part payment upon the debt does

not extend the twenty-year limitation on the sealed instrument given to secure the debt beyond six years after the last part payment. The payment of interest had the effect of a new promise to pay the debt secured by the mortgage, and, a cause of action having accrued upon the debt at the time of such payment of interest and new promise, no reason is perceived why the cause of action to enforce the lien under the mortgage should not continue for twenty years from the date of such part payment. This view seems to be supported by the authorities. *Hough v. Bailey,* 32 Conn. 288; *Peck v. Mallams,* 10 N. Y. 509; *Heyer v. Pruyn,* 7 Paige Ch. 465; *Schifferstein v. Allison,* 123 Ill. 662, 15 N. E. 275; *Kendall v. Tracy,* 64 Vt. 522, 24 Atl. 1118; 13 Am. & Eng. Ency. of Law (2d ed.) 794; 2 Jones, Mortg. (6th ed.) § 1198; *Spear v. Evans,* 51 Wis. 42, 8 N. W. 20. We therefore hold that the complaint states a cause of action.

By the Court.—The order appealed from is reversed.

CASSODAY, C. J., took no part.

STATE EX REL. CITY OF MANITOWOC, Appellant, vs. GREEN and others, Respondents.

March 22—April 9, 1907.

Schools: Change from district to city system: Mandamus *to compel delivery of property: Questioning validity of adoption of general charter: Notice of special district meetings: Sufficiency.*

1. Where a city in which the schools have been conducted under the district system as provided in the general statutes adopts that part of the general city charter law which is applicable to schools, and a board of education is appointed accordingly, *mandamus* on the relation of the city is the proper remedy to compel the district officers to turn over the school property in their possession to the new board of education.

2. In such proceeding by *mandamus*, commenced more than three months after the attempted and assumed adoption of the general charter provisions, the defendants are precluded by ch. 165, Laws of 1899, from calling in question the validity of such assumed adoption.
3. Notice of a special meeting of a school district, stating merely that it would be held at the schoolhouse in said district, was insufficient where there were two schoolhouses in the district.
4. Notice of a special meeting of a school district in a city, stating that the purpose of the meeting was to determine whether or not the district wished to ratify the adoption by the city of the provisions of the general charter law relating to schools, was not sufficient to authorize an election at such meeting to change the district system for schools to the city system under the general charter law.

APPEAL from a judgment of the circuit court for Manitowoc county: E. B. BELDEN, Judge. *Affirmed.*

This is an action of *mandamus* to compel the school board of Joint School District No. 1 of the city and town of Manitowoc to turn over to the city all property belonging to the district or show cause to the contrary. The defendants having made return to the writ and the relator having made answer to such return and the issues so formed having been tried by the court, at the close of the trial the court found as matters of fact, in effect: (1) That the city is a municipal corporation of the third class, operating under a special charter which up to July 7, 1905, contained no provisions in relation to schools or to any city school system of government, and that the public schools of the city prior to that date had been conducted and managed under the public school district system, as provided by the general statutes. (2) That all the territory within the city was divided into four separate school districts known as School District No. 2 and School District No. 7 of the city, and also Joint School District No. 1 and Joint School District No. 4 of the city and town of Manitowoc, each of said joint districts comprising within its limits certain territory of the town in addition to the territory of the city.

(3) That at the time of issuing the writ each of said four districts was organized and represented by duly elected officers in the lawful possession of all the property of the district. (4) That May 22, 1905, an ordinance was introduced into the common council to amend the special charter of the city by adopting all the provisions of subch. XIV, ch. 40*a*, Stats. (1898), being secs. 925—113 to 925—119, and the same was laid over under the rules; that the same was then ordered to be considered at a regular meeting July 3, 1905, and notice thereof was directed in the meantime to be published in the official paper, (5) and the same was published in such paper June 10, 16, and 23, 1905. (4) That July 3, 1905, no quorum being present, the meeting adjourned to July 7, 1905, when a majority of the common council voted in favor of the adoption of such ordinance. (6) That July 28, 1905, a special election was held in each of said four school districts; that the notices of such elections were wholly insufficient in that they failed to state that a change of the school system would be considered at such meetings and failed to sufficiently specify the business to be transacted and which was attempted to be transacted at such meetings, and failed in two of said districts to definitely state the place where such meeting would be held; that in each of two of said districts (including Joint School District No. 1, of which the defendants herein were officers) there were two schoolhouses at considerable distance apart, and the notices posted thereon for said meeting recited that such meeting would be held at the schoolhouse in said district, without specifying in which schoolhouse such meeting would be held; that the notice for such meeting July 28, 1905, in Joint School District No. 1, represented by the answering defendants, was directed to the qualified electors of Joint School District No. 1 of the city and town of Manitowoc, "that a special meeting of said district will be held at the schoolhouse in said district" July 28, 1905, at 8 o'clock in the afternoon, "to determine whether or not said school district

wishes to ratify the adoption of the general charter law of the state of Wisconsin applicable to schools in accordance with the provisions of chapter 287 of the laws of Wisconsin for the year 1899, which said general charter provisions have recently been duly adopted by the city council of the city of *Manitowoc.*" It also gave the form of the ballot. That the notice in each of the other districts was substantially the same and was posted on the door of each of said schoolhouses. (7) That pursuant to such notice a meeting was held in Joint School District No. 1 July 28, 1905, at which a resolution was adopted confirming and ratifying such action of the common council, and at which meeting the whole number of votes cast was 376, including the votes of 118 women, of which number 197 votes were cast for the adoption and ratification of the general charter law relating to schools and 179 were cast against the adoption and ratification of the general charter law relating to schools, and that in each and all of the other districts a large number of women was present and voted on such resolutions. (8) That at and during the submission of such questions in each of said joint districts voters from the town and city indiscriminately were present and voted thereon. (9) That August 7, 1905, the mayor of the city assumed to appoint a board of education for the city, consisting of one commissioner from each of the seven wards, and in addition thereto three commissioners at large, and on August 12, 1905, the board of aldermen by its vote attempted to confirm the same, and at divers times thereafter the board so appointed qualified by taking the constitutional oath of office, elected officers, appointed committees, and assumed to act as such, but never at any time had possession of the school property of the city nor any control of the schools therein or any funds belonging to said schools or their teachers, employees, or other officers, but that the administration of said schools and school property was at all times exercised by and under the control of the several district boards mentioned. (10) That at the

annual meeting of Joint School District No. 1 held July 3, 1905, it was resolved to unite all the districts and joint districts into one joint district to be known as District No. 1 of the city, with the view of establishing a city system of schools and establishing one high school for the city; that said meeting was adjourned to July 6, 1905, and that at such adjourned meeting a resolution was offered to the effect that such application ought to be granted, and the aldermen residing in the district were instructed accordingly, which resolution was referred to a committee with instructions to investigate and report at an adjourned meeting to be held July 17, 1905; that such adjourned meeting declared itself to be opposed to any scheme for the consolidation of the several school districts, and that the school board take all necessary legal steps toward establishing a central high school under the federal system, leaving the grades of the several districts to be maintained and operated as they were. (11) That October 2, 1905, the board of aldermen resolved to levy a special tax of three and one-half mills on the dollar, but the collection thereof was enjoined by the court (15) October 5, 1905. (12) That the new school board so appointed never exercised any duties or functions or became possessed of any such school property. (13) That the new board made demand upon the school district boards, and especially upon the defendants, for all property of the four districts to be delivered to the treasurer of the city for the use of the board. (14) That each of said four district boards continued its functions as before. (16) That all matters and allegations set forth in the return were true and sustained by the evidence.

As conclusions of law the court found, in effect: (1, 2) That the city charter had not been so changed or amended as to confer upon the city power to govern and control the public schools therein, and that each of the four districts was lawfully engaged in managing the schools and school property therein. (3) That no sufficient notice of the time and place

for adopting the proposed ordinance was given, and that the board of aldermen had no jurisdiction to act thereon, and that its action in adopting such general charter was null and void. (4, 5, 6) That the electors of the four several districts could not ratify the action of the city; that the resolution passed and the action taken at the special elections held in the several school districts July 28, 1905, were null and void; that the notices for such special election contained no mention that any such action would be taken, and the votes thereon were illegal and inoperative; that in Joint School District No. 1 and School District No. 7 the notices of election were insufficient because they failed to specify with reasonable certainty the place where the election would be held; that the special election in each of the four districts July 28, 1905, was void and inoperative to change the district system of schools to the city or general charter law system of schools, for the reason that no such action was mentioned or expressed in the notices given or posted for said meetings as intended to be brought before the same for action, nor did such notices specify such change of system as one of the questions to be presented to the voters for their decision. (7) That the action of Joint School District No. 1, July 3 and 17, 1905, was binding on that district for one year. (8) That the mayor never had any power to appoint such new school board, and that the board never had any power or authority to control or govern said schools, nor any right, power, or possession of such school property therein, and that the city treasurer never acquired any right to the possession of the moneys, funds, or credits belonging to said districts. (9, 10) That all the acts of said school board so appointed were void. (11) That the defendants are not barred from their defense in this action by ch. 165, Laws of 1899, and the proceedings in the several elections in said school districts. (12) That the defendants are entitled to an order and judgment dismissing the *mandamus* proceedings herein, with costs.

From the judgment entered in accordance with such findings the relator appeals.

R. W. Burke, city attorney, for the appellant.

For the respondents there was a brief signed *L. J. Nash* and by *J. S. Anderson,* of counsel, and oral argument by *Mr. Anderson.*

CASSODAY, C. J. The view we have taken of this case makes it unnecessary to consider all the questions discussed by counsel.

1. It is claimed on the part of the defendants that the relator has mistaken his remedy—that if he has any remedy it is by *quo warranto* and not by *mandamus.*

"The proceeding by *quo warranto* is the proper and appropriate remedy for trying and determining the title to a public office and of ascertaining who is entitled to hold it, of obtaining the possession of an office to which one has been legally elected and has become duly qualified to hold, and also of removing an incumbent who has usurped it, or who claims it by an invalid election, or who illegally continues to hold it after the expiration of his term." Mechem, Pub. Off. § 478.

This is not a proceeding to oust an actual incumbent of an office and admit another to the same, nor is it a proceeding to test the validity of a statute under which the offices held by the defendants were created. Id. It was held by this court long ago:

"A *mandamus* will issue only where it appears that there is some officer in being having the power and whose duty it is to perform the act commanded by the court." *State ex rel. Carpenter v. Beloit,* 21 Wis. 280.

The person so sought to be commanded must, at least, be a *de facto* officer. Id. Such ruling is fully sanctioned by Mechem, Pub. Off. § 939. See *State ex rel. Mercer v. Sullivan,* 83 Wis. 416, 53 N. W. 677; *State ex rel. Jones v. Oates,* 86 Wis. 634, 57 N. W. 296. The defendants in this case did not usurp or intrude themselves into the offices held by them

respectively. If they committed any wrong it consisted in continuing to exercise the functions of the offices after the right to do so had ceased. They rightfully came into the possession of such offices and were, at least, *de facto* officers at the time the writ was issued, and hence had power to obey the mandate of the court whatever it might be. The purpose of the writ is to compel the defendants to turn over to the new board of education of the city, appointed by the mayor pursuant to the proceedings mentioned in the foregoing statement, all records, books, papers, bonds, inventories, bills, vouchers, contracts, and all property, real and personal, in their possession as officers of such districts. Such property belonged to the public and was devoted to the use of the public, and we perceive no reason why *mandamus* is not the proper remedy to determine the rightful custodians of such property and to secure their possession of the same. *State ex rel. Jones v. Oates, supra; State ex rel. McCoale v. Kersten,* 118 Wis. 287, 292, 293, 95 N. W. 120; *State ex rel. South Milwaukee v. Fowle,* 103 Wis. 388, 79 N. W. 419. In this last case a city was created out of a former village, pursuant to the general charter, and it was held that the government and administration of all schools within the territorial limits of the city devolved upon the new board of education, when elected, provided for by secs. 925—113 to 925—116, Stats. (1898), and that "thereupon the powers and functions of the former governing boards ceased and the [new] board of education is entitled to the possession and control of the schoolhouses, records, books, property, school library, etc., remaining in the hands of the former governing boards, and on demand therefor and refusal to deliver the same such right can be enforced by *mandamus.*" We must hold that the relator has not mistaken his remedy.

2. It is further urged on the part of the defendants that the ordinance adopted by the common council of the city July 7, 1905, to amend the special charter by incorporating therein

secs. 925—113 to 925—119, Stats. (1898), with all amendments thereto, is null and void by reason of the facts found by the court and mentioned in the foregoing statement, and especially by a failure to give the requisite notice for such action of the council prescribed by the statute. Sec. 926, Stats. (1898). On the part of the relator it is claimed that whatever irregularities or defects there may have been in such adoption of the ordinance, they were all cured by ch. 165, Laws of 1899, and that the defendants are thereby barred from taking advantage of such defects and irregularities in this action. Omitting what is not applicable here, that act declares:

"In any case . . . where the common council of any city incorporated by special act shall have undertaken and assumed to adopt, in whole or in part, the provisions of the general city charter law of this state, and such city and its officers shall have assumed thereafter in good faith to act under and to exercise the powers conferred by the provisions of law so assumed to be adopted, any question of the *validity of such assumed adoption* and of the ordinance and proceedings therefor may be tested by *certiorari* or by any other proper action or proceedings brought directly for the purpose of vacating or setting aside the same at any time within three months after such assumed adoption, but not thereafter. . . . No such assumed adoption nor any ordinance or proceeding for such adoption of the whole or any part of such general city charter law shall be in any manner called in question or held to be invalid in any action or proceeding except one *brought directly* for that purpose within the time hereinbefore limited therefor, unless the same shall have been duly vacated or set aside by a court of competent jurisdiction."

That act was passed just prior to the decision in *State ex rel. South Milwaukee v. Fowle,* 103 Wis. 388, 79 N. W. 419, and was probably suggested by the controversy between the two boards of education in that action. The manifest purpose of the act was to prevent such controversy as to the validity of such ordinance, unless brought within the time and

in the manner therein prescribed. There can be no question but that the common council undertook and assumed to adopt the provisions of the general charter mentioned, nor that the city and its officers thereafter assumed in good faith to act under and to exercise the powers conferred by the provisions of law so assumed to be adopted. The special election ordered and held July 28, 1905, was based on the assumption in good faith that such ordinance had been legally adopted. Upon the same assumption the mayor appointed a board of education August 7, 1905, and the common council confirmed the same August 12, 1905, and the members of the board so appointed took the requisite oath of office. Upon the same assumption the common council adopted a resolution levying a special tax on the assessed valuation of all the property in the city October 2, 1905. Upon such assumption such new school board made demand upon the school district boards and the officers of all and each of said four districts, and especially on the defendants, for the delivery to such new board of all and singular the property belonging to said school districts, but the same was refused. This action was not commenced until October 23, 1905, and the return of the defendants to the writ was made November 17, 1905. Besides, the act in question provides, in effect, that the validity of such ordinance should be tested only by *certiorari* or other proper action or proceeding brought *directly* for the purpose of vacating or setting aside the same, within the time prescribed, and should not be called in question in any action or proceeding "except one brought directly for that purpose within the time" prescribed. We must hold that by the act mentioned the defendants are barred from questioning the validity of such ordinance in this action.

3. The defendants contend and the trial court reached the conclusion that the special election held July 28, 1905, was null and void for want of the requisite notice of such election. In each of two of the districts there were two schoolhouses a

considerable distance apart, and the notice posted for the respective meetings simply recited that such meeting would be held at the schoolhouse in said district, without specifying in which schoolhouse such meeting would be held. Nothing could be more uncertain and misleading as to the place where such meeting would be held. One of the two districts where the place of holding the meeting was so indefinitely stated was Joint School District No. 1, of which the defendants herein were officers. Besides, each and all of such notices failed to state that such proposed change of the school system would be considered at such meetings. The mere notice to the qualified electors that the meeting was to determine whether or not they wished to adopt and ratify the provisions of the general charter law relating to schools, which had been adopted by the city council, did not give the requisite information as to the business to be transacted or which was attempted to be transacted. We must hold that such notices were insufficient to authorize such election and change of school system.

As to what electors are qualified to vote at such election there is a sufficient statement in sec. 925—113, Stats. (1898), as amended by ch. 287, Laws of 1899. Counsel contend that women had no right to vote at such election, and cite *Brown v. Phillips,* 71 Wis. 239, 36 N. W. 242, and *Gilkey v. McKinley,* 75 Wis. 543, 44 N. W. 762, but fail to cite *Hall v. Madison,* 128 Wis. 132, 107 N. W. 31. But the trial court did not pass upon the question and we do not.

By the Court.—The judgment of the circuit court is affirmed.

TIMLIN, J., took no part.

WOLF, Executor, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

March 22—April 9, 1907.

Railroads: Injury to passenger alighting before station reached: Negligence: Contributory negligence: Court and jury.

1. Plaintiff's intestate was fatally injured by stepping from defendant's train on a dark, rainy night and falling through a trestle, the train having stopped, as was customary, at a railway crossing a short distance before reaching the station. The usual street lights were not burning. The evidence showed or tended to show, among other things, that the brakeman had called the station and passed forward without giving any warning that the first stop would be at the crossing; and that deceased was familiar with local conditions and with the custom to stop the train at the crossing. There was no evidence of any custom to call the station before such stop. *Held*, that the question of defendant's negligence was one for the jury.
2. To establish negligence on the part of defendant in such case it was not essential to prove that, as alleged in the complaint, the brakeman left the car door open after announcing the station.
3. Notwithstanding the deceased was familiar with local conditions and might have known that the first stop was at the crossing, the circumstances—including the rain, the darkness, the calling of the station, the movement of the brakeman immediately followed by the stopping of the train, and the movements of other passengers indicating a purpose to leave the train at once—are *held* sufficient to make it a question for the jury whether he was guilty of contributory negligence in acting, through momentary forgetfulness, upon the supposition that the station had been reached.
4. What one knows regarding a condition liable to affect his personal safety he is presumed to remember, but even slight circumstances may be sufficient to carry to the jury the question whether momentary forgetfulness in a given case was negligence.
5. Under the circumstances mentioned, and in view of the fact that the customary stop of a train at a small station is often very short and passengers are expected to leave the train promptly, it was not negligence as matter of law for the deceased to step from the train without looking for the customary station lights or observing their absence.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action to recover damages caused to the surviving relatives of Adam Wolf by his death, claimed to have been produced by defendant's negligence.

On the 26th day of October, 1905, the deceased was a passenger on defendant's train, taking passage from Glenbeulah to Plymouth, Wisconsin. When the train approached his destination it was about 6:30 p. m. It was raining hard and was very dark. The street arc lights that were customarily in service at such time were out. The train stopped a short distance before reaching the depot at a point where the car in which Wolf was riding stood on a trestle or bridge and about eighteen feet above the ground. Just before the train stopped the brakeman opened the front door of the car and in a loud voice called the station and then passed forward leaving the door open. When the train stopped, Wolf, supposing he had arrived at his destination, arose from his seat, walked forward onto the car platform, turned to the right, and stepped off the car, when he fell to the ground below, whereby he was so injured that he died the next day. Such in substance are the allegations of the complaint, the negligence claimed being the conduct of the brakeman and the stoppage of the train, falsely indicating to Mr. Wolf that the time had arrived for him to leave it. There was an answer putting in issue the allegations of the complaint as to negligence of the defendant and raising an issue of contributory negligence on the part of the deceased.

The evidence established, or tended to establish, all the allegations of the complaint, except as to closing the door by the brakeman, and the following: A short distance before reaching the railroad station at Plymouth on the occasion in question it was necessary, as was customary, for the train to stop on account of a railway crossing. The deceased was a man seventy years of age, who had resided for some twenty-nine

years in Plymouth. He had previously resided in Glenbeulah, some six miles to the west of Plymouth, had frequently traveled between the two places on the defendant's train, and was well aware of the custom for trains to stop before reaching the crossing, as was done in the instance in question, this, however, not referring to the calling of the station before making the stop. The railroad crossing had existed and the necessity for trains coming from Glenbeulah to stop therefor before pulling down to the station for some twenty-four years. Mr. Wolf was a business man of considerable experience, was well and active for one of his years; and was awake during the entire passage from Glenbeulah to the place where he left the train. His home was on the west side of the station, and it was not uncommon for persons who lived in the westerly part of Plymouth to leave the train when it stopped for the crossing. The depot at the station was lighted as usual, there being electric lights inside and two incandescent lights outside. As the train stopped Mr. Wolf left his seat, went out upon the car platform, closed the door after him, turned to the left, which was the proper course in leaving the train at the station, and stepped off into the darkness, resulting in his death as stated in the complaint. No warning was given by the brakeman after calling the station that the first stop would be at the crossing. Other passengers destined for Plymouth supposed as Mr. Wolf did that the station had been reached and accordingly started or prepared to alight, but were deterred from executing their purpose by the train starting. One person left the car at the rear before the train came to a full stop in order to take a short way to his home, as was often done by persons living in the part of town where Mr. Wolf resided. There was no proof that it was customary to call the station before the train stopped for the crossing, or that the deceased on other occasions had alighted when the train stopped for the crossing in order to take the short way to his home. There was other evidence touching questions submitted to the jury,

but that already referred to is sufficient for the purposes of the appeal.

At the close of the evidence defendant's counsel moved for a directed verdict, which was denied. The cause was then submitted to the jury for a special verdict, resulting in these findings: Adam Wolf stepped from defendant's train and met his death as alleged in the complaint. When he stepped from the train the car on which he was riding was standing still. Just before the train stopped the defendant's brakeman opened the door at the front of the car and called out the station. He did not warn the passengers that the train would stop or had stopped on the bridge. Defendant's servant failed to use ordinary care for the safety of the passengers destined for Plymouth. Mr. Wolf understood from the calling of the station and failure to give warning to the contrary that when the train stopped it was at the station. There was then no street light burning in the vicinity. It was so dark that the exercise of ordinary care would not have brought to his attention the fact that the car was on the bridge. The negligence of the brakeman was the proximate cause of the death of Mr. Wolf. He was not guilty of any want of ordinary care contributing to produce his death. The damages caused to the surviving widow of Mr. Wolf are $1,250.

The defendant moved for judgment notwithstanding the verdict and plaintiff moved for judgment on the verdict. The former was denied and the latter was granted.

Edward M. Hyzer, for the appellant.

M. C. Mead, attorney, and *Simon Gillen,* of counsel, for the respondent.

MARSHALL, J. Counsel for appellant stated this as the proposition presented by the record for decision:

"If a railroad company stops a passenger train at a railroad crossing as the train approaches a railroad station, in the nighttime, after the station has been called, without notice to

the passengers that the stop is not for the station, is such conduct of the company negligent as to a passenger who is entirely familiar with local conditions?"

We cannot agree with counsel that the quoted language accurately covers the matter to be decided. It omits several circumstances which may well have had weight in the mind of the trial court in submitting the cause to the jury, and in the minds of the latter in reaching a conclusion. Some of such circumstances are the following: The station was called by the brakeman as he opened the front door of the car. He closed the door thereafter as if nothing more were to be done on his part before the time for passengers to alight. It was raining hard at the time, suggesting reasonably the closing of the door by the brakeman even though the interval between the calling of the station and the stopping of the train for passengers to alight might be brief. It was a very dark night—so dark that a person could not observe with reasonable distinctness surrounding objects outside the train or the ground at the side of the track. The arc lights which were customarily burning were not in service. There was no proof that the calling of the station was ordinarily followed by two stops, one for the crossing and the other for the station. The attitude of other passengers in the car than Mr. Wolf reasonably suggested to him the thought that the stop was at the station. There was liability, reasonably, for one circumstanced as Mr. Wolf was to be diverted in mind from attention to the fact that it was necessary to stop at the crossing before stopping at the station. We must face the situation pictured by counsel's proposition enlarged by at least all the circumstances mentioned, and from that viewpoint determine whether there was a jury question as to negligence on the part of appellant, and another as to contributory negligence on the part of the deceased.

It is suggested that the negligence alleged was not established, in that there was no proof that the brakeman left the

door open after calling the station, but on the contrary the evidence shows that he closed it. True, the evidence was as claimed, but it is not considered that the allegation in that regard is essential to the cause of action. The dominant circumstances upon which negligence was predicated are that the brakeman called the station without warning passengers that there would be a stop thereafter before the one at the depot platform, the conditions being such that passengers in the exercise of ordinary care, not being so warned, were liable through excusable forgetfulness or otherwise to leave the train at the first stop and where it was dangerous to do so. The calling out of the station, as is usual, preceding the arrival at the place to step from the train, the passing forward by the brakeman immediately after making such call as if in pursuit of his duty to warn the occupants of other cars to be in readiness to alight, the coming of the train to a full stop shortly thereafter without any warning to passengers, as before stated, the darkness of the night, and the unusual condition of the street arc lights being out were the main factors. There was ample proof in respect thereto to carry the case to the jury. Indeed we do not understand the learned counsel for appellant contends, aside from failure to establish all the circumstances alleged as characterizing the negligence charged which we do not deem material, but what the jury were warranted in finding negligence on the part of the appellant on the occasion in question, but it is insisted that it was not actionable fault as to the personal representatives of the deceased, because the deceased was familiar with the local conditions and, therefore, had he exercised ordinary care for his own safety, he would not have been misled into the dangerous step he took. So we pass to the consideration of whether the finding of the jury, that the deceased was free from any want of ordinary care contributing to produce the injury from which he died, has any support in the evidence.

We may well say in passing, to emphasize the foregoing,

that the learned counsel for appellant on the trial freely conceded that if the trainmen misled Mr. Wolf into the belief that the train had arrived at the station when it had not, appellant was guilty of actionable negligence, if Mr. Wolf was so misled without contributory negligence on his part.

It is suggested that Mr. Wolf must have stepped off the train, knowing that he was not at the station, with a view of taking a short way to his home, which was commonly done by persons living in that part of the city wherein he resided, which was west of the crossing; that there is no other reasonable explanation of his movements, since he must have known from his familiarity with local conditions that when the train stopped it was not at the station. There are, it seems, two infirmities in that view: First, the improbability that Mr. Wolf stepped off the train blindly into the darkness, knowing as he must that if the train was not at the station it was liable to be on the trestle, certainly is sufficient to preclude taking the case from the jury in favor of the defendant in respect thereto. Secondly, notwithstanding Mr. Wolf was familiar with local conditions and might have known that the first stopping of the train was for the crossing, he was not bound under all the circumstances to remember all such conditions and the necessity for the first stop, at his peril. If his mind was by any adequate cause momentarily diverted so that the negligence of the appellant became operative while he was taking the course which in his condition of mind the conduct of appellant invited, he was not guilty of contributory negligence. The rule last stated has been often proclaimed by this court and quite decisively in the following language, quoted by respondent's counsel to our attention, from *Collins v. Janesville,* 111 Wis. 348, 87 N. W. 241, 1087:

"Some courts have held that if a person knows of a dangerous defect in a sidewalk he is bound at his peril to remember it [citing authorities]. But this court, in harmony with the weight of authority, holds to the more reasonable and humane

rule that a person may forget the existence of a defect in a street or sidewalk and thereby receive a personal injury, and yet be in the exercise of ordinary care."

True, what a person knows which may affect his personal safety he is presumed to remember in the absence of any circumstance reasonably accounting for his forgetfulness in respect to the matter, but it is so common for one to momentarily forget such a matter, because of his mind being for the time diverted therefrom, that rather slight circumstances have been considered sufficient to carry the question to the jury of whether failure to remember in the given case was consistent with ordinary care.

It was said in *Collins v. Janesville, supra,* in respect to the nature of the presumption that what one knows regarding a condition liable to affect his personal safety he is presumed to have in mind and to be wanting in ordinary care in failing to avoid the danger, that "the presumption is rebuttable and gives way so readily to explanatory circumstances that any reasonable excuse for the forgetfulness is sufficient to carry the case to the jury on the question of plaintiff's contributory negligence."

The following precedents fully illustrate the application of the doctrine stated: In *Wheeler v. Westport,* 30 Wis. 392, a physician on the way to visit a patient in the nighttime, his mind being diverted by reason of conversation with a companion, momentarily forgetting a dangerous place in the highway with which he was perfectly familiar, drove into it and was injured. In *Crites v. New Richmond,* 98 Wis. 55, 73 N. W. 322, the plaintiff stepped into a hole in the sidewalk with which he was familiar, his mind being momentarily diverted by a call to him from a person on the opposite side of the street. In *Cumisky v. Kenosha,* 87 Wis. 286, 58 N. W. 395, the plaintiff was injured by reason of a dangerous ridge of ice on a sidewalk. She knew of the obstruction and had passed over it but a short time before. The only explanation

of her failure to remember and avoid it was that her mind was diverted by the thought of hurrying along to avoid meeting a number of workmen, who were about to leave a shop on her route of travel. In *Petrich v. Union,* 117 Wis. 46, 93 N. W. 819, the plaintiff was injured by reason of the wheel of the wagon in which she was riding dropping suddenly into a gully in the traveled track, with which the plaintiff was familiar. The only explanation of her failure to remember the defect was that she was engaged in conversation with her husband about the farm, and that it was dark. To the same effect are *Strack v. Milwaukee,* 121 Wis. 91, 95, 98 N. W. 947; *Lyon v. Grand Rapids,* 121 Wis. 609, 615, 99 N. W. 311; *Coppins v. Jefferson,* 126 Wis. 578, 105 N. W. 1078.

Applying the foregoing to the facts here it is considered that the darkness of the night, the rain, the absence of the street lights, the sudden call of the station, the movement of the brakeman immediately followed by the stopping of the train, and the movements of other passengers than Mr. Wolf, indicating a purpose to immediately leave the train, were amply sufficient to carry the case to the jury on the question not only of whether the deceased knew where the car was, but whether he ought to have known of it in the exercise of ordinary care. It is within reasonable probability that he was thrown off his guard without fault on his part, amounting to a want of ordinary care, by such circumstances, and that the suggestion to alight held out by the call for the station and the stopping of the train was the producing cause of the mischief.

It is further contended that since there was a light in the depot and two incandescent lights outside, as was the custom, it was contributory fault on the part of the deceased in not observing such a conspicuous object before he stepped off the train; that the absence of the customary depot lights, had the deceased been in the exercise of ordinary care, would have efficiently suggested to him that the train was not at the sta-

tion. Due consideration has been given to that phase of the case, which is doubtless the most persuasive of any in appellant's favor. It does not seem under all the circumstances to be so far controlling as to establish contributory negligence of the deceased as a matter of law. It is very natural for a person riding on a railway train, upon the station to which he is destined being called, and the train coming to a full stop shortly thereafter, to suppose, nothing appearing to the contrary, that he must alight without delay. Ordinarily he would be considered wanting in due care if he did not do so. The absence of any proof here that it was customary to call the station before the stop at the crossing is a most significant circumstance. It may well be presumed that there was no such custom, at least unaccompanied with a notification that the station would not be reached till the second stop, under such conditions as existed at the time in question. Such a custom unless so accompanied, under such circumstances, would be quite liable, at least as to persons not acquainted with local conditions, to lead to just such an occurrence as took place. So it may well be that the calling of the station and what followed threw Mr. Wolf off his guard as to whether a stop at the crossing had been made, or such stop had been neglected, and caused him to leave his seat and pass to the point of stepping off the train with an excusable degree of haste and confusion.

When he arrived at such point it is the opinion of the court upon the evidence that he was not, as a matter of law, bound at his peril of being successfully charged with contributory negligence, to hesitate and look for the depot, or observe its absence before taking the next step. The customary interval between the stopping and starting of a train at small stations is often very short. Again, customarily passengers are expected to promptly leave the train upon its stopping at a station so as not to obstruct the way for those who wish to board it. Further, the deceased was not bound to suppose that his car was located in front of or in any closer proximity to the

depot than to enable him to safely step to the ground or to the platform. So, under all the circumstances, we cannot reach the conclusion with the clearness requisite to warrant overruling the decision of the trial court, that the deceased was guilty of negligence as a matter of law in not taking an efficient observation respecting the presence of the depot before the fatal step. There is much force in what was said in *Richmond & D. R. Co. v. Smith,* 92 Ala. 237, 9 South. 223, cited and quoted from at length by counsel for respondent:

"Having been induced by the conduct of the company's employees to reasonably believe that the train was at the station, he was authorized to believe that he could descend the step to the ground with safety. The name of the station having been announced it was natural that the passengers destined" therefor "would commence to leave the train as soon as it was brought to a full stop. . . . The train having been stopped at an unusual place, short of the station, it was the duty of those in charge to use all due precaution to protect the passengers from injury, especially when it is dark and the train is stopped on a trestle or other place of danger."

Of course, if the situation at the depot in the nighttime was customarily, and on the night in question, such that upon the train arriving at the proper place for passengers to alight the depot lights would necessarily have challenged Mr. Wolf's attention, and the absence thereof as he was about to take the last step in all reasonable probability would necessarily have challenged his attention, and would have caused him to hesitate and efficiently investigate, had he been in the exercise of ordinary care, the case would be with the appellant, but it is the opinion of the court in view of all the circumstances that he may have been in the exercise of such care and yet have proceeded from his seat to and inclusive of the fatal step without looking for the station lights or his attention being attracted efficiently to the absence thereof. Having been thrown off his guard so that when he started to leave the train he had

reasonable ground to believe he was at the station it was not wholly unreasonable, tested by the standard of ordinary care, for him to complete his purpose to alight without hesitating to take notice of his surroundings. The darkness of the night, the thought that the stop would be brief, and the rain, may reasonably have efficiently influenced him to move rapidly with a view of leaving the train and reaching his home as speedily as practicable, and to take the last step from the car in the full belief that the car was at the station.

Counsel for appellant cites to our attention *East Tenn., Va. & Ga. R. Co. v. Holmes,* 97 Ala. 332, 12 South. 286, as substantially on all-fours with the case in hand. The rule of that case is stated thus:

"Although a passenger may reasonably conclude that he has reached his destination when the name of the station is called and the train comes to a stop, yet, if the circumstances would indicate to a prudent person that the proper stopping place had not been reached, and he voluntarily steps from a moving train in the darkness, he is guilty of such contributory negligence as will defeat a recovery for injuries sustained."

That statement seems sufficient without comment to show that the case comes far short of fitting the situation we have to deal with. True, there is language in the opinion which would support appellant's view if applied here without keeping in view the doctrine of excusable forgetfulness and the circumstance in the cited case that after the train stopped it resumed its course before the passenger left the car, thereby challenging his attention as to the absence of indications of a station. Of course, while legal principles in cases of this sort do not change or bend to fit different situations, the result to which they lead depends upon the facts of the particular case. Often the presence or absence of some particular circumstance turns the scale.

We will not further discuss the case. We have sufficiently given the reasons why, in the opinion of the court, the ques-

tion of whether the deceased was guilty of contributory negligence was for the jury. No good can be accomplished by discussing the numerous authorities cited to our attention and the many others which are at hand bearing some analogy to the case before us. The principles involved are few, simple, and well understood. All of the authorities relied upon by both sides have been carefully examined. When viewed with reference to the exact facts here involved it is believed that they support the conclusion reached. The result of counsel's labor in bringing to the attention of the court such authorities we will preserve. It may be very beneficial to the profession and the court in similar cases. *Mitchell v. C. & G. T. R. Co.* 51 Mich. 236, 16 N. W. 388; *Central R. Co. v. Van Horn,* 38 N. J. Law, 133; *Taber v. D., L. & W. R. Co.* 71 N. Y. 489; *McGee v. Mo. Pac. R. Co.* 92 Mo. 208, 4 S. W. 739; *Memphis & L. R. R. Co. v. Stringfellow,* 44 Ark. 322; *Terre Haute & I. R. Co. v. Buck,* 96 Ind. 346; *Miller v. East Tenn., Va. & Ga. R. Co.* 93 Ga. 630, 21 S. E. 153; *Southern Kan. R. Co. v. Pavey,* 48 Kan. 452, 29 Pac. 593; *Coe v. L. & N. R. Co.* (Ky.) 78 S. W. 439; *Laub v. C., B. & Q. R. Co.* 118 Mo. App. 488, 94 S. W. 550; *Chesapeake & O. R. Co. v. Smith,* 103 Va. 326, 49 S. E. 487; *Baltimore & P. R. Co. v. Jean,* 98 Md. 546, 57 Atl. 540; *Columbus & I. R. Co. v. Farrell,* 31 Ind. 408; *Wood v. L. S. & M. S. R. Co.* 49 Mich. 370, 13 N. W. 779; *Hemmingway v. C., M. & St. P. R. Co.* 72 Wis. 42, 37 N. W. 804; *Stutz v. C. & N. W. R. Co.* 73 Wis. 147, 40 N. W. 653; *McDermott v. C. & N. W. R. Co.* 82 Wis. 246, 52 N. W. 85; *Werner v. C. & N. W. R. Co.* 105 Wis. 300, 81 N. W. 416; *Ellis v. C., M. & St. P. R. Co.* 120 Wis. 645, 98 N. W. 942.

By the Court.—The judgment is affirmed.

CASSODAY, C. J., took no part.

TAYLOR and another, Appellants, vs. DALL LEAD AND ZINC COMPANY, Respondent.

March 23—April 9, 1907.

Liens: Subcontractors: Agency of principal contractor for owner: Waiver: Estoppel: Notice of claim: Time limited: Successive deliveries of materials: Unity of transaction.

1. Within the scope of a building contract the principal contractor is the agent of the owner to subject his property to liens in favor of subcontractors for labor and materials; and a subcontractor who furnishes to the principal contractor materials which are wrought into the building in compliance with the specifications of the contract is entitled to a lien notwithstanding a failure of the principal contractor to complete the building in exact compliance with the contract and without regard to whether the principal contractor may be debarred of a lien by reason of the fact that nothing is owing him upon his contract.
2. When a payment was about to be made to the principal contractor in accordance with the contract, subcontractors asked the owners to pay the money to them on their bill for materials, but failed to obtain a written order from the principal contractor as suggested by the owner, and took no legal proceedings to intercept the payment to the principal contractor. They had no contract right to intercept it. *Held*, that these facts did not show any waiver of the subcontractors' rights, any estoppel, or any extension of time of payment to the principal contractor.
3. Sec. 3315, Stats. (1898), requiring a subcontractor furnishing materials to give notice of his claim of lien within sixty days after such materials are furnished, does not require a separate notice for each delivery where all were so connected as to constitute substantially one transaction, and in such a case the furnishing is not deemed complete until the last delivery.
4. Where the principal contractor for a building orders and receives from a subcontractor material therefor from time to time as the construction progresses, it will be presumed that such purchases have relation to each other and constitute but one transaction for the purposes of the lien statute, although there may be no express agreement in advance that the principal contractor will purchase, or the materialman furnish, all that may be called for in such construction; but where the continuity of such deliveries is broken by long and unusual periods of time, a presumption against the unity of the transaction arises, un-

less such interruption and severance in time be clearly explained.

5. Subcontractors agreed to furnish for the construction of a mill a large quantity of lumber according to a list submitted by the principal contractor, and there was a tacit understanding that they would be called upon to furnish such other lumber as might, in accordance with usual experience, be needed in addition to that specified in the list. They furnished additional lumber in pursuance of such understanding, the deliveries being closely connected in time and the lumber being wrought into the mill in the course of the continuous and uninterrupted construction. *Held*, that there was but a single furnishing of materials and that notice of the subcontractors' claim for a lien might be given at any time within sixty days after the last delivery.

APPEAL from a judgment of the circuit court for La Fayette county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action to foreclose subcontractors' lien. The defendant, a mine owner, entered into a written contract with the Platteville Foundry & Machine Company to build for the former a concentrating plant, furnishing all materials, according to plans and specifications attached to the contract, for the sum of $13,500. The specifications covered the mill, engine house, and connected building in which, by the specifications, there were to be placed certain patented tables which, it was expected, would economically serve a purpose of separating certain inconsistent portions of the ore. The contractor was in the line of business of manufacturing such plants and had had experience with such tables. Included in the proposal and specifications adopted by the contract was an express guaranty by the contractor that the mill should have a certain capacity and that the separation of the ore should be accomplished up to a specified degree of completeness. The contractor built the mill complete and exactly in accordance with the specifications, but, by reason of peculiarities in defendant's ores, the patented tables were found ineffective, so that the ore could not be separated upon them in accordance with the guaranty. That could only be done by the substitution

of roaster appliances in connection with the same buildings, which was afterwards done by the defendant at an expense of about $7,000. Pending the doing of the work defendant had made two twenty-five per cent. payments to the principal contractor in accordance with the terms of the contract, aggregating $6,750, all parties being then ignorant of the inefficiency of the patented tables.

Plaintiffs, lumber dealers at Platteville, at about the time of the commencement of the work, were asked to figure upon a list of lumber supposed to be all that was necessary for the construction of the entire plant, and made a price thereon of $2,335, which was accepted. Such lumber was delivered from time to time between the date of the contract and about August 19, 1904. After such bid several additional small quantities of lumber were ordered and delivered by plaintiff and used in the construction of the mill as originally designed, bringing the total up to $2,525.95, the last instalment of such subsequent orders being delivered September 23, 1904. Plaintiffs' notice that they claimed a subcontractors' lien was served November 19, 1904.

After the discovery that the tables would not separate the ore as guaranteed, the principal contractor became bankrupt, and, by some arrangement between the defendant and the receiver, the former took possession of the premises, apparently upon mutual abandonment of all claim by one against the other; the defendant making no claim for damages by reason of the breach of the guaranty nor for return of any of the moneys paid, and no claim having been thereafter urged against the defendant in favor of the principal contractor's estate.

The defendant denying plaintiffs' subcontractors' lien, this action was brought and tried, and, after disclosure of substantially the foregoing facts, with perhaps some others to be mentioned in the opinion, the court denied plaintiffs' right to lien on several grounds, and entered judgment dismissing the complaint, from which plaintiffs appeal

For the appellants there was a brief by *Burns & Ellis,* and oral argument by *E. E. Burns.*

W. H. Beebe, for the respondent.

DODGE, J. The trial court, as indicated by an opinion filed, found three reasons why the plaintiffs could not maintain a lien against the defendant's property, although the lumber had been furnished by them as subcontractors of a principal contractor and in exact accordance with the principal contract. Of these reasons in their order:

1. The trial court, in substance, held that, because the principal contractor did not complete its contract by the construction of buildings and appliances satisfying its guaranty of efficiency, it could itself have maintained no lien; certainly not for any amount in excess of that which had been paid it, which was all that was payable by the terms of the contract until the efficacy of the plant could be tested; and that, since no lien could be maintained by the principal contractor at the time plaintiffs commenced their action, they could have none. Our statute on the subject of subcontractors' liens, sec. 3315, Stats. (1898), provides substantially as follows: Every person who, as subcontractor of a principal contractor, furnishes any materials to such principal contractor for or in or about the erection, construction, etc., of any building or appurtenances thereto, may have the lien and remedy given by this chapter. Now, it is undisputed that the plaintiffs did exactly those things. They did, as subcontractors, furnish material to the principal contractor for the erection of a building and appurtenances, and such materials were wrought into a building and appurtenances now standing on the defendant's land.

The query at once becomes pertinent why any court can ignore the behest of the statute that the plaintiffs have a lien. Prior to 1889 the statute itself gave one reason whenever the enforcement of a lien would compel the owner to pay more than his original contract required; but that obstacle is now removed. The trial court advances as a reason the fact that

the principal contractor could not itself have maintained a lien; but the statute makes no such exception. That such fact is not universally an obstacle to the subcontractor's right is, of course, clear, for the principal contractor could maintain no action for a lien if it had been paid all that it was entitled to, whether such payment were the full contract price or were some less sum to which the principal contractor's right might be reduced because of some right of deduction, setoff, or counterclaim existing in the owner's favor. The trial court seems to have found authority for an exception to the generality of the language of the statute in *Goodman v. Baerlocher,* 88 Wis. 287, 60 N. W. 415, where it was apparently held that no lien against the land could exist for materials furnished for the erection of a building, unless that building was in fact so completed as to come into physical existence. Whether even this doctrine could be extended, as in the present case, to deny the lien where the building came into exact and complete existence according to its specifications, but merely failed to satisfy an ancillary guaranty of complete effectiveness for a given purpose, may well be questioned, for the latter situation would go only to the liability of the owner to pay anything, or anything more than he had paid, which would seem to be deprived of any efficacy to defeat subcontractors' liens by the amendment to our lien statutes already mentioned, brought in by ch. 333, Laws of 1889. The principle rested on in the *Baerlocher Case,* which may be called the Pennsylvania doctrine, even if applicable to the present situation, was simply that, no building coming into physical existence, there never had been any physical substance upon which the mechanic's lien could fasten. This doctrine was, however, carefully considered by this court in *Halsey v. Waukesha Springs S. Co.* 125 Wis. 311, 104 N. W. 94, and entirely repudiated as inconsistent with both the language and the policy of our own statutes, which give a lien on the land upon the furnishing of the materials, provided the work of

erection of the structure is in fact commenced; such view having the support of *Rees v. Ludington,* 13 Wis. 276; *Jessup v. Stone,* 13 Wis. 466; and *Fitzgerald v. Walsh,* 107 Wis. 92, 82 N. W. 717. We are informed by counsel that the *Waukesha Case* was not called to the attention of the trial court. Had it been, we cannot think he would have based any conclusion upon the doctrine that the mere failure of the principal contractor to complete the contracted building in exact compliance with the terms of the contract was an insuperable obstacle to the existence of a subcontractor's lien.

Another ground of escape from the direct words of the statute conferring the lien, as stated by the trial court and urged by the respondent, is a rule declared or suggested in several cases, that the right of the subcontractor is referable to the original contract, and that what would not be "lienable" in favor of the principal contractor under his contract is not lienable in favor of a subcontractor. This rule is in apparent derogation of the express words of the statute and therefore is to be very cautiously applied. In *Goodman v. Baerlocher, supra,* it was said, *arguendo:*

"If the case is such that the principal contractor is not entitled to a lien for any other reason than that he has been paid in full, as in case of abandonment of his contract or of destruction of the building before completion, the subcontractors under him, and their materialmen and laborers, would not seem to be entitled to any lien."

This language has already been criticised, if not repudiated, in *Seeman v. Biemann,* 108 Wis. 365, 84 N. W. 490, and properly so, for the statute does not limit the right of the subcontractor to cases where the principal contractor could have a lien, and did not do so even when it contained the express limitation protecting the owner against payment of more than the contract price.

The two most important cases in which has been declared the dependency of the subcontractor's lien upon the original

contract are *Siebrecht v. Hogan,* 99 Wis. 437, 75 N. W. 71, and *Seeman v. Biemann,* 108 Wis. 365, 84 N. W. 490, and they well illustrate the scope of that rule. In the first of these a lien was denied to a subcontractor for damages and additional expense caused by wrongful acts of the principal contractor and not called for by the contract. There the court, construing the words of the statute, said:

"Manifestly, such right of lien is confined to work, labor, and material required by the principal contract. To that extent, by force of the statute, the owner makes the principal contractor his agent to bind his property, but no further. . . . The whole theory of it is that the owner consents to what is required to carry out the principal contract, and makes his property liable therefor in accordance with the statute, which is made a part of the contract."

The logic of this case is that labor or materials expended by a subcontractor by reason of the wrongful acts of the principal contractor, not within his original contract, are not performed by the plaintiff "as a subcontractor," for he cannot be a subcontractor where there is no principal contract contemplating such service; hence he would not fall within the words of the statute conferring a lien merely for work done "as a subcontractor."

In *Seaman v. Biemann* the holding was that a subcontractor can have no lien for work or materials where the principal contract expressly provides that no liens shall be demanded. This is upon the principle, of course, that the subcontractor, by becoming such under the principal contract, agrees to abide by such terms, and therefore by express agreement waives his lien. It is reiterated in that case that his right against the property depends upon the agency of the principal contractor created by that contract to bind the property of the owner, and that a stipulation therein against the claiming of liens for any work or materials is an express limitation upon that agency, to which the subcontractor assents by acting thereunder. In that case it was expressly declared:

"Of course, where a claim is not lienable in favor of the principal contractor, it is not lienable in favor of the subcontractor; but, the lienability of a claim being established, a subcontractor's right to enforce it is not dependent upon whether the owner of the building might defeat it if the claim were made by the principal contractor."

In both of these cases we find aptly defined the true relation under our statutes between the subcontractor and the owner of the land in the declaration that within the scope of the contract the principal contractor is created the agent of the owner to subject his property to a lien in favor of the subcontractor for labor or materials. Applying that rule here, there can be, of course, no hesitation in holding that every foot of lumber, supplied by the plaintiffs upon the order of the principal contractor and used by it in constructing the buildings and their appurtenances in exact compliance with the specifications of the principal contract, was within the scope of the agency created by that document, and that the plaintiffs' right to lien therefor cannot be affected by any consideration whether the principal contractor might be debarred of a lien by reason of the fact that nothing was owing it upon its principal contract.

2. Another ground which the trial court seems to have considered sufficient to deny plaintiffs their lien, and which respondent now urges, is somewhat indefinitely described as waiver, estoppel, or extension of time to the principal contractor. This is wholly predicated upon the fact that, when a certain payment of $1,375 was about to be made in accordance with the contract, the plaintiffs' agent asked the owner that it be paid to them upon the lumber bill, to which the owner responded that he could accede only upon a written order from the principal contractor. This the principal contractor refused to give, and plaintiffs' agent so reported to the owner. The acts of the plaintiffs' agent are thus described by the trial court in its opinion:

"Mr. Martin did not obtain such order, desisting from pressing the foundry company for it upon representations

made to him by the latter, deciding to wait until the next payment was due. He so informed the president of the mining company before the company made said second payment."

We can find in this nothing to indicate waiver, or to arouse an estoppel, or to show any extension of time of payment to the principal contractor. The plaintiffs, at most, refrained from taking legal proceedings to intercept the payment of this money by defendant to the principal contractor. They had no contract right to intercept it, and therefore could neither effectively object nor consent to its payment. They had done all they could to enable the defendant to protect itself, for they had given notice that the lumber bill had not been paid and that they wished the money to be paid to them.

3. The most serious difficulty we have had is upon the decision of the trial court that about $190 worth of lumber ordered from time to time without any specific agreement was upon independent and separate contract from the principal item in the account, which was delivered in pursuance of an accepted bid made about June 13th, and therefore that the lumber included in the original bill was not furnished within sixty days of the service of the notice for claim of subcontractors' lien. This involves so much of a question of fact that, if there be any fair dispute in the evidence, we should probably feel concluded thereby. The statute, of course, requires that a subcontractor furnishing materials, in order to have a lien therefor, must give the notice within sixty days after such material is furnished. This, however, has always been construed as not requiring a separate notice for each service or delivery where all were so connected as to constitute substantially one transaction. In such case the furnishing has been considered as continuing throughout the whole period, so that it is not completed until the last delivery. Phillips, Mech. Liens (3d ed.) § 229; Jones, Liens (2d ed.) § 1435; *Spruhen v. Stout,* 52 Wis. 517, 9 N. W. 277; *Dorestan v. Krieg,* 66 Wis. 504, 29 N. W. 576; *Wis. P. M. Co. v. Grams,* 72 Wis. 275, 39 N. W.

531; *Williams v. Lane,* 87 Wis. 152, 58 N. W. 77; *Skyrme v. O. M. & M. Co.* 8 Nev. 219; *Helena S. H. & S. Co. v. Wells,* 16 Mont. 65, 40 Pac. 78; *Nye & S. Co. v. Berger,* 52 Neb. 758, 73 N. W. 274; *Frankovic v. Smith,* 34 Minn. 403, 26 N. W. 227. That thus is opened the door for attempts at abuse is apparent, and many such attempts appear in the books, where one who has fully completed the service or the furnishing of materials that was in original contemplation, and has neglected to claim his lien therefor, has later, upon the rendition or delivery of some service or material in some degree connected with the same enterprise or property, attempted thereby to revive his right to a lien for the former. Such attempts were met and defeated in *E. M. Fish Co. v. Young,* 127 Wis. 149, 103 N. W. 795; *Brown & H. Co. v. Trane,* 98 Wis. 1, 73 N. W. 561; *Brown v. Edward P. Allis Co.* 98 Wis. 120, 73 N. W. 656; *Berry v. Turner,* 45 Wis. 105.

We think it may safely be stated, as the result of experience and authority, that where one having in hand a general undertaking, such as the erection of a building, orders and receives material to be worked into that building from time to time as construction progresses, there is generally an understanding that such purchases have relation to each other, and constitute but one transaction for the purposes of the lien statute, although there may be no express contract or agreement in advance that the owner or principal contractor will purchase, or the materialmen will furnish, all that may be called for in such construction; and that it is the custom of materialmen to keep a running account of the several deliveries as such a single transaction. Many of the above authorities sustain this view and the conclusion that a presumption to that effect is to be indulged by courts. Where, however, the continuity of such deliveries is broken by long and unusual periods of time, a presumption against the unity of the transaction doubtless arises, unless such interruption and severance in time be

clearly explained. In some cases of even such interruption, however, the courts have sustained the unity of the transaction upon the ground that the last items of service or material were expressly required by a general contract under which the whole was performed. Striking illustrations are *Fowler v. Bailley,* 14 Wis. 125, 130, and *Hutchins v. Bautch,* 123 Wis. 394, 101 N. W. 671. That the existence of such unity of contract is not essential, however, to the unity of the transaction when the latter appears from the continuity of the services, their application to a single enterprise, and the attitude of the parties toward it, is decided in many cases. *Chapman v. Wadleigh,* 33 Wis. 267; *Spruhen v. Stout,* 52 Wis. 517, 9 N. W. 277; *Kerrick v. Ruggles,* 78 Wis. 274, 277, 47 N. W. 437; *Miller v. Batchelder,* 117 Mass. 179; *Frankoviz v. Smith,* 34 Minn. 403, 26 N. W. 227; *State S. & D. Mfg. Co. v. Norwegian-Danish Sem.* 45 Minn. 254, 47 N. W. 796; *St. Paul & M. P. B. Co. v. Stout,* 45 Minn. 327, 47 N. W. 974; *Jones & M. L. Co. v. Murphy,* 64 Iowa, 165, 19 N. W. 898; *Rush v. Able,* 90 Pa. St. 153; *Skyrme v. O. M. & M. Co.* 8 Nev. 219; *Albright v. Smith,* 2 S. Dak. 577, 51 N. W. 590.

In the light of these rules and the distinctions illustrated by the several decisions, let us examine the evidence in this case, in which there is really very little conflict. The principal contractor, having taken the contract to build this mill and its appurtenances, submitted to the plaintiffs a long list of various sizes and dimensions of lumber to be supplied for that work. The agent conducting the business testifies that it was intended to include all the lumber necessary for the buildings, but that, almost uniformly, such attempts to specify in advance are only approximately correct, and that in almost all cases it is found that some things have been omitted. Hence, of course, both parties, being experienced in their business, dealt with such probability in mind. Plaintiffs' agent testifies to the understanding that if their price on this original estimate was accepted they would be expected to furnish such

lumber as was wanted for the whole building contract. This was somewhat ambiguously denied by the representative of the principal contractor, who testified merely that it was not his understanding of the agreement "that the plaintiffs were to furnish all our lumber and building supplies as needed as the work progressed." This, however, is explained by his further statement that he did not intend to buy of them all the building material, and illustrates that the principal contractor furnished its own galvanized roofing, cement, and other building material. Again, on cross-examination, in response to the direct question, he says, "No, I would not say that that was the understanding; but I would not dispute that we have—we might have." After the plaintiffs' bid was made they commenced delivering the lumber specified in the original invoice, which they mainly ordered specially and had shipped in cars direct to the Dall mine. These carload shipments continued until nearly the 1st of August, and some omitted items of the original invoice were delivered from time to time thereafter up to about August 19th. Meanwhile, as early as August 5th, the principal contractor, discovering certain other lumber not included in these specifications to be needed, apparently as a matter of course ordered the same from the plaintiffs; and so, from time to time, thereafter, at short intervals, namely, August 5th, 15th, and 19th, and September 10th, 14th, 19th, and 23d; to which orders the plaintiffs, equally as matter of course and without question, responded by delivering all said articles and charging them upon the same account which they had opened with the principal contractor under heading, "For Dall Mine." The first bill rendered by plaintiffs to the principal contractor was September 7th, and included, first, the contract price of the original invoice, $2,335, and also the several other items which had been delivered up to that time. That bill was received, checked up, and certain trifling corrections made, with no comment indicating surprise at the joining of these various items in one account and in one bill.

Against this state of facts and testimony is the evidence of

the representative of the principal contractor: "This bill of lumber [the original] purchased of Taylor Bros. was a distinct and independent transaction. Our subsequent purchases were all extras over and above that contract." This he explained upon cross-examination by declaring: "Each order I gave for that mill was independent of every other order in the same sense that the first was independent of the rest." This seems to make it quite clear that the testimony of this witness as to the independence of the several orders was, as of course it must have been, his own conclusion, and based upon his own conception of what constituted independence and severance; and it also indicates that his conception of that distinction was very different from that which the courts recognize, for they, with almost complete unanimity, treat a series of successive orders for material for a single undertaking, thus closely connected in time, as not independent in the sense that they did not together constitute a single furnishing of materials.

After careful examination and consideration of all this evidence we are forced to the conclusion that, practically without dispute, it establishes both an understanding, tacit perhaps, that plaintiffs were to be called on and would respond to furnish such other lumber as might, in accordance with usual experience, have been omitted from the specifications upon which they originally bid, and that both parties fully understood that all the subsequent deliveries were in pursuance of such original understanding. It is too plain for controversy that they were all so closely connected in time, and so in response to the continuous and uninterrupted construction of the building, that no doubt is cast upon the entire good faith of both parties so as to bring the situation within the condemnation of some of the cases above cited. We have no doubt that the ordinary dealer in building materials would consider, under similar circumstances, that he had not completed the furnishing of materials for the construction of this mill so

long as the principal contractor was continuing with construction and needing and ordering materials in so doing. Any rule of law which would declare a severance and render necessary repeated notices, and perhaps repeated suits, as each such delivery was made, would do violence to the common understanding of people engaged in such transactions, would accomplish no good purpose in the way of protecting reasonably diligent owners, and would only serve as a trap to defeat materialmen and laborers who have merely postponed efforts of enforced collection to the final completion of their undertakings in good-faith expectation that payment would then be provided. Such is not the policy of our lien statutes, whose spirit, we are well convinced, will be best effected by holding that the transactions here disclosed constituted but a single furnishing of materials for this single enterprise of constructing this building. So holding, of course the conclusion is irresistible that plaintiffs are entitled to judgment establishing their lien as claimed.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in accordance with the prayer of the complaint.

CASSODAY, C. J., took no part.

WILLIAMS and others, Appellants, vs. JONES, Respondent.

March 23—April 9, 1907.

Deeds: Construction: Exception or reservation? Standing timber: Wills: Realty to be converted into money: Election by devisees.

1. A conveyance of land by a man seventy-six years old contained, after the description, the following: "saving, excepting and reserving for himself, the grantor herein, all the timber now growing and standing on the south half of the said premises, with the right at all times to enter on the said premises to cut and

haul the said timber away during the next forty years, but the grantor herein agrees to cut and haul away each year what is necessary for him for firewood and other uses on the grantor's farm." *Held*, that this constituted an exception of the timber from the grant, and that the grantor's title thereto, so retained by him, was real estate which, at his death, would pass to his heirs or devisees, subject to the limitation of forty years for its removal. TIMLIN, J., dissents, being of the opinion that the language quoted constituted a reservation, not an exception.

2. The will of such grantor directed the conversion of his real estate into money, but said timber, not being treated by the executrix as the testator's property, was not so converted. The devisees entered upon the land, claimed the timber as their property, and removed a portion of it; and some of the devisees conveyed their interests in the timber to another of them. *Held*, that this was an effectual election by the devisees to treat and hold the timber as real property.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

On May 12, 1900, Thomas Williams sold the defendant *Thomas H. Jones* a forty-acre tract of land, and gave a deed therefor containing the following clause:

"The southeast quarter of the southeast quarter of section eighteen (18), town six (6) north, of range four (4) east of the fourth principal meridian, saving, excepting and reserving for himself, the grantor herein, all the timber now growing and standing on the south half of the said premises, with the right at all times to enter on the said premises to cut and haul the said timber away during the next forty years, but the grantor herein agrees to cut and haul away each year what is necessary for him for firewood and other uses on the grantor's farm in the town of Dodgeville."

Thomas Williams died November 4, 1900, testate, at the age of seventy-seven years. His will made certain bequests, and all the rest, residue, and remainder of his estate was devised and bequeathed to twelve of his children share and share alike. The executrix was authorized to sell and convey his real estate and to convert it into money and to make distribution of the proceeds as directed by the provisions of the will. In the

administration of the estate no account was taken of the timber saved, excepted, and reserved to the grantor in the deed. The plaintiff *John T. Williams,* one of the children of Thomas Williams, to each of whom was given a one-twelfth interest in the residue of the estate, has obtained a quitclaim deed from ten of his brothers and sisters of their shares in the property reserved by the deed of their father. *Bessie Williams* and *Doris Williams* are the children and *Mattie Williams* the widow of Hugh T. Williams, deceased, one of the children of Thomas Williams given a share in the residue of the estate of Thomas Williams.

The complaint alleges that defendant has, since December 14, 1904, the date of the quitclaim deed from his brothers and sisters to *John T. Williams,* cut down and carried away from this south half of the forty acres timber to the value of $190, and judgment is demanded for that sum. The answer sets up the claim of title to the lands and the timber growing thereon, and counterclaims for damages done by the plaintiffs in cutting timber from this south half of the forty. The trial court found for the defendant and awarded him $121.40 on his counterclaim. This is an appeal from this judgment.

For the appellants there was a brief by *Richard Carter* and *Vroman Mason,* and oral argument by *Mr. Mason.* They argued, among other things, that if the doctrine of equitable conversion applies to this case the facts show an election by the heirs and devisees to consider the timber as land, and hence that there was a reconversion. 7 Am. & Eng. Ency. of Law (2d ed.) 480, 482; *Hetzel v. Barber,* 69 N. Y. 1, 11; *Prentice v. Janssen,* 79 N. Y. 478; *De Vaughn v. McLeroy,* 82 Ga. 687; *Beal v. Stehley,* 21 Pa. St. 376; *Ridgeway v. Underwood,* 67 Ill. 419. The clause in the deed relating to the timber constituted an exception, as distinguished from a reservation. 3 Washb. Real Prop. (6th ed.) §§ 2352, 2353; Shep. Touch. 80; *Pritchard v. Lewis,* 125 Wis. 604; *Rich v. Zeilsdorff,* 22 Wis. 544; *Martin v. Gilson,* 37 Wis. 360; *Fischer v.*

Laack, 73 Wis. 313, 320; *Craig v. Wells,* 11 N. Y. 315. The right to the timber being an exception, that is, something withheld and not granted at all, it would remain in the grantor and his heirs, and words of inheritance would not be required to retain the fee. *Emerson v. Mooney,* 50 N. H. 315; *Whitaker v. Brown,* 46 Pa. St. 197; *Winthrop v. Fairbanks,* 41 Me. 307; *Smith v. Ladd,* 41 Me. 314; *Burr v. Mills,* 21 Wend. 290; *Hagerty v. Lee,* 54 N. J. Law, 580, 20 L. R. A. 631, note. Although at common law a reservation, being the same as a grant in that it created a new right or estate in the grantor, required words of inheritance to reserve a fee, yet this would not be necessary under our statute. Sec. 2206, Stats. (1898); *Karmuller v. Krotz,* 18 Iowa, 352; *Sears v. Ackerman,* 138 Cal. 583, 72 Pac. 171; *Babcock v. Latterner,* 30 Minn. 417.

For the respondent the cause was submitted on the brief of *J. P. Smelker.*

SIEBECKER, J. The rights of the parties to damages under the respective claims set forth in the pleadings depend upon their right to and interest in the timber involved. The controversy arises under the foregoing clause of the deed. The trial court held that Thomas Williams, the grantor in the deed, retained no interest in the timber embraced in this clause other than the right to cut and remove it during his life, and that whatever timber he did not so cut and remove belonged to the defendant, the grantee in the deed. This could only result from construing it to be in effect a reservation of the right to cut and remove the timber only during his lifetime. The appellants aver that the court erred in so construing it, and contend that this provision constitutes an exception to the conveyance of the forty acres embraced in the deed, and that the grantor retained the title to all the timber growing and standing on the south half of these premises.

The distinction between a reservation and an exception in a

deed was observed and noted in the early case of *Rich v. Zeilsdorff*, 22 Wis. 544, and it was declared "that a reservation is always of something taken back out of that which is clearly granted; while an exception is some part of the estate not granted at all." This case dealt with rights growing out of a provision of a deed respecting timber, and it was held that where "the timber is reserved, . . . the courts hold that this is strictly an exception, since it is part of the realty, or a part of the estate, and would have passed to the grantee but for the exception. The property in the timber continues in the grantor, with the right in so much of the soil as is necessary to sustain it." Page 548. The language of the clause in this deed respecting the timber in question is the following: "Saving, excepting and reserving for himself, the grantor herein, all the timber now growing and standing on the south half of the said premises." The words employed distinctly convey the idea that the right to all the timber "growing and standing" on the land is retained by the grantor. The effect of this is that the title to the timber was retained by the grantor, and this operates to except it from the conveyance. The part of this clause wherein the grantor reserved "the right at all times to enter on said premises to cut and haul the said timber away during the next forty years, but the grantor herein agrees to cut and haul away each year what is necessary for him for firewood and other uses on the grantor's farm in the town of Dodgeville," shows that the parties contemplated a forty-year limitation for its removal, and that the grantor undertook to remove so much of it every year as he needed for his farming purposes. This condition in no way conflicts with the claim that the grantor did not part with the title to this timber, nor does it tend to show that he reserved merely the personal right to cut and remove timber within the period of forty years. The fact that grantor at the time of the conveyance was of the age of seventy-six years is persuasive that the parties did not contemplate that the forty-year limitation within which the

timber was to be removed reserved no more than a personal right in the grantor to cut and remove the timber. The practical certainty that he would live but a small part of this period negatives the idea that he reserved no more than a personal right to cut and remove it, but indicates that he retained a title and interest in the timber which would go to his heirs at his death, and that they were limited to this period in which to remove it as their property. This construction of the clause gives full effect to every part of it, and, when applied to the facts and circumstances surrounding the parties when the transaction occurred, harmonizes the natural significance of the phraseology employed with what seems to have been contemplated by the parties. In the following cases in this court questions of a similar nature were considered: *Golden v. Glock,* 57 Wis. 118, 15 N. W. 12; *Pritchard v. Lewis,* 125 Wis. 604, 104 N. W. 989; *Strasson v. Montgomery,* 32 Wis. 52. In other jurisdictions, see *Whitaker v. Brown,* 46 Pa. St. 197; *Winthrop v. Fairbanks,* 41 Me. 307; *Sears v. Ackerman,* 138 Cal. 583, 72 Pac. 171. Under this construction of the clause, the growing timber on the premises at the time of grantor's death was real estate owned by him, and he had an interest in so much of the soil as was necessary to sustain it. 28 Am. & Eng. Ency. of Law (2d ed.) 543; *Strasson v. Montgomery, supra; Young v. Lego,* 36 Wis. 394; *Lillie v. Dunbar,* 62 Wis. 198, 22 N. W. 467.

The trial court seems to have given much weight to the conduct of the executrix of the will of Thomas Williams in not treating this timber as grantor's property and in not converting it into money for distribution as directed by the will. We cannot perceive that so much weight should be given to the action of the executrix. The heirs seem to have consistently treated the timber as part of their father's estate by entering on the premises and claiming it as their property and by removing part of it under such claim of ownership, and by all of them, except the heirs of Hugh Williams who appear as plaintiffs, deeding their interests to the plaintiff *John T. Will-*

iams. We must regard such conduct on the part of the heirs as an effectual election to treat this timber as real estate when it had not in fact been converted as directed in the will.

From these considerations it follows that Thomas Williams was the owner of the timber in question at the time of his death, that it constituted part of his estate, and title thereto passed to his heirs under the will. By their conduct they elected to hold it as real property without converting it as directed by the will. The defendant therefore wrongfully cut and removed some of the timber and plaintiffs are entitled to compensation therefor.

The judgment of the trial court awarding defendant damages and denying plaintiffs relief must be reversed, and the cause remanded with directions to grant judgment to plaintiffs for such sum as the court may find will compensate them for the timber which defendant wrongfully removed from the premises in question, and for costs.

By the Court.—So ordered.

TIMLIN, J. (*dissenting*). The court below considered the provision in question a reservation rather than an exception. Thereupon it became necessary to determine the duration of the estate or rights reserved. This presented a question not of the mere omission of words of inheritance in the reservation, but also of the legal effect of the affirmative words employed therein. The whole property is first granted. Then, "saving, excepting and reserving *for himself, the grantor herein,* all the timber now growing and standing, . . . with the right at all times to enter on the said premises to cut and haul the said timber away during the next forty years, but the grantor herein agrees to cut and haul away each year what is necessary for him for firewood," etc. I think this was a reservation within the rule of cases cited in the majority opinion. The words "exception" and "reservation" represent incompatible ideas in the law, and if both terms be employed to describe the same thing one or the other must yield. The same thing can-

not be at once an exception and a reservation. It seems to me that here both terms are employed to describe the same estate or right. No such estate or right in the timber as the grantor has by this provision existed prior to the conveyance in question. No such estate or right as the grantor by this provision has in the timber could therefore be created by mere exception from the grant. It is a new right, differing from his former estate or right not only in point of duration, but also with respect to his duty to cut and remove each year. Under the disposition of this case made by the majority, what has become of the right of the grantee to enforce annual removal? If this is a reservation instead of an exception, and there is not only an absence of words of inheritance but words in the instrument as well as extrinsic facts tending to show that the reservation was personal to or during the life of the grantor, the court below was justified in holding that the rights therein reserved did not survive the grantor, and consequently the judgment below should be affirmed.

CASSODAY, C. J., took no part.

RIEF, Executrix, Respondent, vs. CONTINENTAL CASUALTY COMPANY, Appellant.

March 23—April 9, 1907.

Insurance: Illness indemnity: Findings: Evidence: Varying written contract.

1. In an action to recover an illness indemnity under a policy of insurance, findings to the effect that the insured contracted an acute illness and by reason thereof was necessarily and continuously confined strictly to his house and was regularly visited by a qualified physician, are *held* to have no support in the evidence.
2. There being no claim of fraud or mistake and no foundation laid for a reformation of the policy, evidence to vary or contradict the terms of the policy was not admissible.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

This action was brought by plaintiff as executrix to recover for a sick benefit claimed to be due her testator under a policy of insurance issued by the defendant company. The action was tried by the court without a jury and resulted in findings and judgment for plaintiff for $87 and costs. Defendant appealed from the judgment.

The clause in the policy under which plaintiff claims the right to recover is as follows:

"An illness indemnity of thirty dollars per month, or at that rate for any proportionate part of a month for the time, after the first week, the insured is necessarily and continuously confined strictly in the house, and being regularly visited by a legally qualified physician, by reason of acute illness that is contracted and begins after this policy has been in full force and effect, without delinquency, for thirty consecutive days immediately preceding the commencement of such illness; and a partial indemnity at one fifth of said monthly rate for such time as he shall immediately thereafter, by reason of such illness, be wholly and continuously disabled and prevented from attending to or performing any and all kinds of business, though not necessarily confined in the house, while under the care of a legally qualified physician; provided, that the total length of time for which indemnity shall be paid, for any one continuous illness, shall not exceed eight consecutive months. Disability resulting from sunstroke, freezing, carbuncles, boils, felons, abscess, and ulcers is classified as illness and covered only under paragraph number three hereof."

The following errors are relied upon for reversal:

(1) The court erred in making finding 3, as follows: "(3) That said Frank J. Rief contracted an acute illness on the 17th day of October, 1904."

(2) The error of the court in making finding 4, as follows: "(4) That he was necessarily and continuously confined strictly to his house by reason of said acute illness till he died

on January 14, 1905, and was regularly visited by a qualified physician."

For the appellant there was a brief by *Higbee & Higbee,* and oral argument by *E. C. Higbee.*

C. L. Hood, for the respondent.

KERWIN, J. The plaintiff's claim for recovery is based upon clause 3 of the policy, set out in the foregoing statement of facts. This clause provides for an illness indemnity of $30 per month for the time after the first week the insured "is necessarily and continuously confined strictly in the house, and being regularly visited by a legally qualified physician, by reason of acute illness." The errors assigned raise the question of the sufficiency of the evidence to support the findings under clause 3 of the policy. We have searched the record in vain for evidence to support the findings. There is absolutely no evidence that the plaintiff's testator was necessarily and continuously confined strictly to his house by reason of an acute illness, or that he was regularly visited by a qualified physician. The evidence shows that he had some trouble with his throat, and was operated upon October 17, 1904, at which time it was found that he had a cancerous growth in his throat; that it was a chronic condition; that it got worse towards the last; that cancer is never an acute disease. There is no evidence that cancer is an acute disease, or that illness produced from it is an acute illness, or that the operation produced an acute illness, or that the testator's illness was an acute illness. In fact the third and fourth findings excepted to are wholly unsupported by the evidence. It may be that the idea of counsel for respondent was that, while cancer is not an acute disease, still an acute illness was caused in some way by the operation or otherwise. But the difficulty is that there is no proof that the testator was afflicted with an acute illness through any cause.

Evidence was offered on the trial, somewhat indefinite, but

as we understand it calculated to vary or contradict the terms of the policy. This evidence was duly objected to. There is no claim of fraud or mistake, and no foundation laid for a reformation of the policy. Hence evidence to vary or contradict its terms was inadmissible.

We think it very clear that findings 3 and 4 are not supported by the evidence, and therefore the judgment must be reversed.

By the Court.—Judgment of the court below is reversed and the cause remanded for a new trial.

CASSODAY, C. J., took no part.

TRAVELERS INSURANCE COMPANY, Respondent, vs. HALLAUER, Appellant.

March 23—April 9, 1907.

Pleading: Construction: Facts inferable from facts alleged: Conclusions: Voluntary payment.

1. If the language of a complaint will reasonably admit of a construction that will support it, that construction should be adopted rather than one that will condemn it; and to that end all facts reasonably inferable from facts expressly alleged are to be deemed to be set forth and as forming part of the pleading.
2. A complaint alleged in substance that defendant wished to appeal from a judgment against him for about $7,000; that the plaintiff company, which had insured him against liability on such judgment in the sum of $5,000, procured from a surety company an undertaking on appeal to pay the judgment; and that defendant agreed in writing that if the judgment should be affirmed he would pay to plaintiff any amount which the latter might be obliged to pay in excess of $5,000. The complaint then averred that plaintiff was obliged to and did pay said judgment, including a certain amount in excess of $5,000. *Held*, on demurrer, that the latter averment did not state a mere conclusion of law, and that it included, by reasonable inference, an averment that the judgment was affirmed on the appeal, so that the payment was not voluntary.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

The appeal is from an order overruling a general demurrer to the complaint.

For the appellant there was a brief by *Higbee & Higbee,* and oral argument by *E. C. Higbee.*

For the respondent there was a brief by *Vilas, Vilas & Freeman,* and oral argument by *E. P. Vilas.*

TIMLIN, J. The complaint averred among other things not relevant to the questions presented that one Herbert J. Coolidge recovered a judgment in the circuit court for La Crosse county against the defendant for $7,129.77 damages and costs. The plaintiff had insured the defendant against liability on said judgment to the amount of $5,000, and, the defendant intending to appeal from said judgment to the supreme court, the National Surety Company, at the instance and request of the plaintiff, furnished an undertaking on said appeal to pay said judgment. A written agreement annexed to and part of the complaint was made and executed by the defendant to the plaintiff, whereby the defendant agreed that if the judgment so appealed from should be affirmed he would pay to the plaintiff any amount in excess of plaintiff's liability of $5,000 aforesaid which the said judgment directed to be paid, in case the plaintiff was obliged to pay any amount in excess of its liability aforesaid. It is then averred that the plaintiff on or about December 30, 1905, was obliged to and did pay on said judgment $5,347.27, and on or about January 27, 1906, the additional sum of $2,266.78, in all $7,612.05, and in excess of its liability under the terms of its contract or policy with defendant $2,612.05; that it demanded payment of the latter sum from the defendant. Does such complaint state a cause of action for the recovery by the plaintiff from the defendant of the sum last mentioned?

The complaint presents this legal problem: A. is a judg-

ment debtor to the amount of about $7,000, from which judgment A. desires to appeal. B. is liable to A. for $5,000 thereof. B. having this interest requests C. to sign a *supersedeas* bond on appeal, and C. does so sign at B.'s request. A. agrees that if the judgment appealed from be affirmed he will pay B. any amount in excess of $5,000 directed to be paid by the judgment if B. is obliged to pay any such amount. B. pays up the whole judgment and then demands of A. contribution to the amount of the excess over $5,000, and brings an action to enforce such demand, averring, to cover the necessary averment of affirmance of the judgment appealed from, only, that "this plaintiff was obliged to and did pay upon said judgment," etc. If under the conditions aforesaid there was an averment in the complaint that the judgment in question was affirmed by the supreme court there would arise by implication a liability on the part of B. to indemnify C., and B. having done so pursuant to this duty there would arise by implication a liability on the part of A. to repay to B. such part of the money so paid by B. as was paid to the use of A., even in the absence of A.'s written contract mentioned. The written contract of A. mentioned would also create such liability. *Hunt v. Amidon,* 4 Hill, 345, 348; *Appleton v. Bascom,* 3 Met. 169; *Edmunds v. Wallingford,* 54 L. J. (Q. B.) 305; *Randolph's Adm'x v. Randolph,* 3 Rand. 490; *Clanton v. Coward,* 67 Cal. 373, 7 Pac. 787; *Hamilton v. Johnston,* 82 Ill. 39; *Bushnell v. Bushnell,* 77 Wis. 435, 46 N. W. 442; *Boutin v. Etsell,* 110 Wis. 276, 85 N. W. 964.

The validity of this complaint as against the demurrer then turns upon the question whether the averment therein that B. was obliged to and did pay upon said judgment, etc., can stand for the fact of affirmance of said judgment. It is contended by the appellant that this expression states a conclusion of law and is therefore not good pleading. Whether a finding is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by application of the arti-

ficial rules of law. *Levins v. Rovegno,* 71 Cal. 273, 12 Pac. 161. It is not easy to formulate a definition that will always describe what is a mere conclusion of law so as to distinguish it from a pleadable ultimate fact, or that will define how great an infusion of conclusions of law will be held to enter into the composition of a pleadable fact. *Clark v. C., M. & St. P. R. Co.* 28 Minn. 69, 9 N. W. 75. But where the conclusion describes a legal status or condition or a legal offense it would ordinarily be termed a conclusion of law. Where, on the other hand, the conclusion describes a condition or status not represented or designated by some definite legal term or rule it will ordinarily be a conclusion of fact. Conclusions of fact are said to be inferences drawn from subordinate evidentiary facts. *Caywood v. Farrell,* 175 Ill. 480, 51 N. E. 775. There is an intermediate class which are said to be mixed conclusions of fact and law, some of which are by usage and precedent pleadable as facts. Of this class the following are illustrations: "That defendants succeeded to and became possessed of said life interest." *Curtiss v. Livingston,* 36 Minn. 380, 31 N. W. 357. "Is the owner in fee simple." *Johnson v. Vance,* 86 Cal. 128, 24 Pac. 863. "Elected to give exclusive credit to the maker." *Usher v. Waddingham,* 62 Conn. 412, 28 Atl. 538. "Money was reloaned." *Spurgeon v. Smitha,* 114 Ind. 543, 17 N. E. 105. "Converted plaintiff's property to his own use." *Duggan v. Wright,* 157 Mass. 228, 32 N. E. 159. Coming to our own court: That defendant was "negligent." *Fitts v. Waldeck,* 51 Wis. 567, 8 N. W. 383. That an execution was "duly issued." *Jones v. Davis,* 22 Wis. 421. That defendant made a contract through its duly authorized agent. *Smith v. Barron Co.* 44 Wis. 686. That an instrument is "lawfully possessed and owned by said administrator and plaintiff." *Hyde v. Kenosha Co.* 43 Wis. 129. That a mortgage "was and is subject and subsidiary to the mortgage or trust deed of your orators." *Iowa Co. v. Mineral Point R. Co.* 24 Wis. 93. This is described in the last-mentioned case as one of several mixed

propositions of fact and law which for the purpose of pleading are treated as facts. That certain persons "are the heirs at law." *Gillett v. Robbins,* 12 Wis. 319. That money borrowed by town officers for a town "was used for legitimate town purposes so that defendant [town] had the full benefit thereof." *Thomson v. Elton,* 109 Wis. 589, 85 N. W. 425. It is further stated in the last-mentioned case that every reasonable intendment and presumption should be made in favor of a pleading; that if the language of a complaint will reasonably admit of a construction that will support it, that construction is to be sought for, and adopted when found, instead of one that will condemn it. It then adds: "To that end all facts reasonably inferable from facts expressly alleged are to be deemed set forth and as forming a part of the pleading." And lastly, there is the case of *Norris v. Milwaukee D. Co.* 21 Wis. 130, where the very point is decided, and an averment that "plaintiffs were compelled to and did make good to the consignees a certain deficiency" held a sufficient averment that the payment was not voluntary. We find, however, to the contrary of the last proposition, *Price v. Doyle,* 34 Minn. 400, 26 N. W. 14. We are required in such case to follow the decisions of this court.

By the Court.—The judgment of the circuit court is affirmed.

CASSODAY, C. J., took no part.

DOHERTY, Appellant, vs. DOHERTY and others, Respondents.

March 23—April 9, 1907.

Mortgages: Foreclosure: Parties: Claimants of note and mortgage.

In an action to foreclose a mortgage it was alleged that certain defendants claimed to have some interest in or lien upon the premises and to be the owners of the note and mortgage and had

made such claim to the defendants personally liable to pay the note, by reason whereof the latter had refused to pay the note to plaintiff; but that such claimants had in fact no interest in the note and mortgage or the premises. Judgment was demanded, among other things, adjudging plaintiff to be the sole owner of the note and mortgage. *Held*, on demurrer, that under sec. 2603, Stats. (1898), such claimants were properly made parties defendant.

APPEAL from an order of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

This is an appeal from an order sustaining a demurrer to a complaint in an action to foreclose a mortgage on the lands described, alleging, in effect, that the mortgage was executed March 12, 1904, by James Doherty and his wife, Ida, to one Mary Doherty, to secure a note of even date due in two years for $500 with interest at six per cent., and also to secure two other notes which had been paid before the commencement of this action, and that in consideration of such payment a portion of other real estate not specifically described in the complaint in this action was released from the mortgage; that in 1904 Mary Doherty assigned said note and mortgage to this plaintiff, who has ever since been the owner and holder thereof; that in 1905 the defendant James Doherty conveyed to the defendant J. M. Halderson the premises described in the mortgage, and Halderson thereby and therein assumed and agreed to pay said note and mortgage; that in 1905 Mary Doherty died at La Crosse, and in June, 1905, the defendant *Anna Meyer* was appointed special administratrix of her estate; that the mortgagor's wife, Ida, died before the commencement of this action; that March 24, 1906, the mortgage was recorded. The complaint also alleges that James Doherty and J. M. Halderson are liable for any deficiency that may remain after the foreclosure and sale of the mortgaged premises, and asks that they be adjudged liable for such deficiency. *Barney Doherty, Mary Jane Reagan,* and *Anna Meyer* individually and as such special administratrix were made defend-

ants in the action and demurred to the complaint, and from an order sustaining such demurrer the plaintiff appeals.

The complaint contains the usual averment that no proceedings had been had at law or otherwise for the recovery of the sum secured by the note and mortgage. The allegations of the complaint upon which it is claimed that the demurring defendants are properly made parties to the action are as follows:

"That all of said defendants other than said J. M. Halderson and Josie Halderson, his wife, claim to have some interest in or lien upon said mortgaged premises, or some part thereof, and claim to have some interest in said note and mortgage of this plaintiff, and have made claim to this plaintiff and to said defendants J. M. Halderson and James Doherty that they were the owners of said note and mortgage; that said defendants in fact have no interest in said note and mortgage or in said premises whatsoever; that the plaintiff now and at all times since he became the owner of said note and mortgage, as before stated, has been in exclusive and sole possession of said note and mortgage; that said defendant J. M. Halderson has refused to pay said note on the grounds that he is unable to determine who is really the owner of said note and mortgage, and is unable to determine whether this plaintiff or the defendants other than said J. M. Halderson and Josie Halderson, his wife, or some of them are the owners of said note and mortgage, and because of the claims made to said note and mortgage by said defendants other than said J. M. Halderson and wife; that said defendants other than said J. M. Halderson and his said wife have notified the defendant J. M. Halderson not to pay the said note and mortgage to the plaintiff."

The complaint also alleges:

"Said plaintiff therefore demands judgment that he be adjudged to be the sole and absolute owner of said note and mortgage, and that said defendants be adjudged to have no interest whatsoever therein, and be barred from claiming any right, title, or interest therein."

Geo. W. Bunge, for the appellant.

C. L. Hood, for the respondents.

CASSODAY, C. J. From a reading of the complaint it is manifest that the demurring defendants are made parties to this action merely because they claim to have some interest in or lien upon the mortgaged premises or some part thereof, and claim to have some interest in and to be the owners of said note and mortgage; and that they make such claim of ownership not only to the plaintiff, but also to the defendants personally liable for the payment of the note and mortgage, and who by reason of such claim refuse to pay the same to the plaintiff. Of course, it is important to the persons so personally liable that such conflicting claims to the ownership of the note and mortgage should be conclusively determined before payment. It is only by making all claimants parties that the money can safely be paid into court. In view of these facts the plaintiff demands judgment that he be adjudged to be the sole and absolute owner of the note and mortgage, and that the demurring defendants have no interest therein and be barred therefrom. True, the complaint alleges that the demurring defendants have in fact no interest whatsoever in said note and mortgage or said premises; but does that prevent the demurring defendants from being proper parties to this action? The statute declares:

"Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein." Sec. 2603, Stats. (1898).

This does not limit the defendants to those who have an interest in the controversy, but extends to and includes those who claim such interest. See, also, sec. 2610 and the last clause of sec. 3186, Stats. (1898). We must hold that the demurring defendants were properly made parties to this action.

By the Court.—The order of the circuit court is reversed, and the cause is remanded with direction to overrule the demurrer and for further proceedings according to law.

QUIGGLE, Respondent, vs. HERMAN and others, Appellants.

March 23—April 9, 1907.

Bills and notes: Rights of holder: Notice of infirmity: Pleading: Note given for stallion: Lack of words required by law: Invalidity: Statutes: Validity in part.

1. In an action upon a note alleged to have been transferred to plaintiff for value before due, an answer alleging that the giving of the note was induced by certain false and fraudulent representations, by reason of which defendants were damaged in a certain sum, and that when plaintiff purchased the note he knew the fact that the representations were made and that they were false when made, is *held* sufficiently to charge that plaintiff had notice of the infirmity in the instrument when he purchased it and hence was not a holder in due course.
2. Ch. 438, Laws of 1903, though void so far as it relates to patents and patent rights, is valid so far as it relates to notes or other evidences of indebtedness given for stallions. *J. H. Clark Co. v. Rice*, 127 Wis. 451, limited.
3. One part of a statute may be unconstitutional and the remainder may still have effect, provided that the two parts are distinct and separable and not dependent upon each other.
4. A note given for a stallion, but not having on its face the words required by ch. 438, Laws of 1903, is void. [Whether, as to an innocent purchaser before due, the maker of such a note would be estopped to set up its illegality, not determined.]

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

For the appellants there was a brief by *Higbee & Higbee,* and oral argument by *E. C. Higbee.*

George H. Gordon, for the respondent.

WINSLOW, J. This is an action for a balance of $350 and interest alleged to be due upon a promissory note of $750 executed by the defendants November 27, 1903, to one Jones, and alleged to have been transferred to the plaintiff for value before due. The defendants by their answer alleged that the note was given in part payment of the purchase price of a

stallion, and that it did not bear upon its face the words, "The consideration for this note is the sale of a stallion or interest therein," as required by sec. 1675—1*a*, Stats. (Supp. 1906; Laws of 1903, ch. 438). The answer further alleged in substance that said Jones at the time of such sale doped and doctored said stallion so as to make him appear sound, and fraudulently represented him to be in all respects sound and a sure foal getter that would get over eighty per cent. of foals for mares served, upon which representations the defendants relied in buying said stallion and in executing said note, whereas said stallion was in fact windbroken and had the heaves and was not able to get more than forty per cent. of foals for mares served; that had the stallion been as represented he would have been worth $1,600, whereas he was not in fact worth more than $100, and the defendants thereby sustained damages in the sum of $1,500; that at the time said note was transferred to the plaintiff he knew that the same was executed in part payment for a stallion and that the note had not upon it the words required by said chapter. The answer further alleged upon information and belief that the plaintiff at the time of said transfer knew that the stallion was fraudulently represented to be sound when sold to the defendants, and knew that he was in fact not sound and of no value; wherefore the defendants demanded judgment setting off their damages against the amount due on the note and that the action be dismissed. Upon the trial the plaintiff objected to the reception of any evidence under the answer on the ground that it stated no defense, and the objection was sustained and judgment rendered for the plaintiff, from which the defendants appeal.

We are satisfied that the ruling of the trial court was erroneous for two reasons: First. The answer alleged that the purchase of the stallion and the giving of the note were induced by false and fraudulent representations of soundness, by reason of which the defendants were damaged in the sum of

$1,500, and that when the plaintiff purchased the note he knew of the fact that the representations were made and that they were false when made. These allegations sufficiently charge that the plaintiff had notice of the infirmity in the instrument when he purchased it, and hence was not a holder in due course, but took the note subject to the defense of which he thus had notice. Secs. 1676—22, 1676—26, 1676—27, Stats. (Supp. 1906; Laws of 1899, ch. 356). Second. The answer also alleged that the note was given as part of the purchase price of a stallion, and that the note did not bear upon its face the words required by ch. 438, Laws of 1903, and that the plaintiff knew both these facts when the note was transferred to him. Sec. 1 of said chapter (sec. 1675—1*a*, Stats.—Supp. 1906) provides that all notes or evidences of debt given for any lightning rod, patent, patent right, stallion, or interest therein, shall have written or printed thereon in red ink the words, "The consideration for this note is the sale of a lightning rod, patent, patent right, stallion, or interest therein," as the case may be. Sec. 2 (sec. 1675—1*b*) provides that any person who shall sell either of such named chattels, who shall take a note or other evidence of debt therefor which fails to state the consideration as provided in sec. 1, or in words of similar import, shall be liable to a penalty equal to the face of the note. Sec. 3 (sec. 1675—1*c*) provides that all notes and evidences of debt so taken, which express the consideration on their face as required by sec. 1, shall be non-negotiable, and be subject to all defenses in the hands of an innocent holder which they would have been subject to if not transferred.

It is first argued by the respondent that the act named is unconstitutional and has been so held by this court in the case of *J. H. Clark Co. v. Rice,* 127 Wis. 451, 108 N. W. 231. It is true that in that case this court considered the statute named, so far as it concerned notes given for patent rights, and held it void because it invaded the federal statute governing

the purchase and sale of patents, which is supreme on that subject. While it was said in that case that the "act is unconstitutional and void," this language must be construed with reference to the question there involved, namely, the question of its validity as far as it affects the sale of patent rights. No mention was made of those parts of the statute relating to the sale of lightning rods or stallions, because they were not involved; hence the decision cannot be considered as affecting the question of the validity of these last-named provisions. It is well understood that part of a statute may be unconstitutional and the remainder may still have effect, provided the two parts are distinct and separable and are not dependent upon each other. It is only where the void part of a statute was evidently designed as compensation for or an inducement to the otherwise valid portion, so that it must be presumed that the legislature would not have passed one portion without the other, that the whole statute must be held void. *State ex rel. Walsh v. Dousman,* 28 Wis. 541; *Gilbert-Arnold L. Co. v. Superior,* 91 Wis. 353, 64 N. W. 999. This cannot be said with regard to the law under consideration. The patent feature cannot be reasonably considered as in any way dependent upon the stallion feature, or as an inducement to its passage. This is demonstrated by the fact that the law stood for two years upon the books without the stallion feature. Ch. 268, Laws of 1901. The sales of lightning rods, patent rights, and stallions were evidently considered by the legislature as transactions presenting quite similar opportunities and inducements for overreaching by fraudulent methods, and so it was determined that they might well be controlled by the same restrictive provisions; but there is absolutely no indication either in the law itself or in the nature of things that the restriction upon the free sale of stallions or lightning rods was considered in any way dependent upon or compensated by the restriction upon the sale of patent rights. It is not claimed that such a restriction upon the freedom of sales of stallions

is unreasonable or unwarranted. The records of this court in recent years seem to show that such transactions present peculiarly seductive opportunities for misrepresentation and fraud, even surpassing those presented by the traditional horse trade. So we conclude that, so far as the stallion feature of the law in question is concerned, it is a proper exercise of the police power and valid.

But it is further claimed by respondent that even if the act be held valid its only effect upon notes is to render those which have the required words upon them nonnegotiable, and hence that notes given in violation of the law without the words upon them remain negotiable instruments as before. This contention is very clearly untenable. A note given for a stallion, which does not have the required words on its face, is a note given in direct violation of positive law. The giving or receiving of such a note is prohibited by law under a penalty. Hence a note so given is void because the giving of it is an illegal act, just as a contract made upon Sunday is held void because it is the transaction of business upon Sunday in violation of law. Whether the maker of such a note which has passed into the hands of an innocent purchaser before due would be estopped from setting up the illegality of the transaction, as was held with regard to a note executed on Sunday but dated on a secular day (*Knox v. Clifford,* 38 Wis. 651), is not necessary to be considered, as the answer alleges that the plaintiff knew when he received the note that it was given in part payment for a stallion.

By the Court.—Judgment reversed, and action remanded for a new trial.

CASSODAY, C. J., took no part.

HORN, by guardian *ad litem*, Appellant, vs. LA CROSSE BOX COMPANY and another, Respondents.

March 23—April 9, 1907.

Appeal: Questions decided on former appeal: Master and servant: Injury to servant: Contributory negligence: Court and jury: Assumption of risk: Instructions to jury: Special verdict: Consistency of answers.

1. The decision of a question on appeal is conclusive of the same matter when again presented in the same case upon the same or substantially the same evidence.
2. A decision on a former appeal that plaintiff, against whom a verdict had been directed on the ground that the evidence showed his contributory negligence as matter of law, was entitled to have that question submitted to the jury, is *held* to be conclusive of defendant's right to have that question so submitted on a second trial upon substantially the same evidence.
3. Plaintiff, a boy fifteen years old, substantially a man grown, and intelligent for his years, was injured by the revolving knives of a planing machine in defendants' mill while attempting to clean out a hopper under the knives. *Held*, that the jury were properly instructed that if plaintiff knew that there was a rapidly revolving knife or knives at the edge of the hopper and that his hand was liable to come in contact therewith in attempting to take hold of the hopper, he must be held to have appreciated the danger and assumed the risk in attempting to do the work, although by express direction of the defendants; that the true test as to whether a minor has assumed the ordinary risks of his employment or is guilty of contributory negligence is not whether he in fact knew and comprehended the danger, but whether, under the circumstances, he ought to have known and comprehended such danger; and that defendants had a right to assume that the plaintiff was a person of ordinary common sense for one of his years and that he would exercise such care to avoid dangers which were visible and which he knew, or ought to have known, existed as might be reasonably expected of one of his years and capacity.
4. Such instructions, being given with reference to a question submitted for special verdict covering the matter of plaintiff's contributory negligence or assumption of the risk, were not objectionable as informing the jury of the effect of their answer to the question.

5. A finding that plaintiff was guilty of contributory negligence was not inconsistent with a finding that when he attempted to clean out the hopper he did not know of the revolving knives which were liable to come in contact with his hand. Taken together, such findings indicate that the jury decided that, under the circumstances, plaintiff ought to have known and comprehended the danger.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Action to recover for a personal injury.

Plaintiff, a boy of fifteen years of age, in the employ of the defendants, engaged in cleaning out a hopper that was choked with sawdust and chips, located under the revolving knives of a planer, lost one of his hands by its coming in contact with such knives. There was evidence tending to show the following: Plaintiff was substantially man-grown, weighing 150 pounds, and quite intelligent for one of his years, but he had very little experience with machinery, particularly with planing machinery. He was set to work at a planing machine without having been instructed as to the perils incident to the work. He worked, prior to the time he was injured, in defendants' factory for about twenty-three days. A portion of the time each day he was employed at the planer taking away lumber.

One of the principal issues litigated was with reference to whether the plaintiff was guilty of contributory negligence. On a former trial of the action a verdict was directed in favor of the defendants upon the ground that the evidence showed contributory negligence on plaintiff's part as a matter of law. Upon appeal from the judgment it was reversed, the court holding that whether plaintiff was so guilty or not was a jury question, and that the trial court should have submitted the cause accordingly. The plaintiff testified that he did not know of the revolving knives, or of the interior mechanism of the machine, or that when the rolls stopped the knives would continue for some time to revolve. There was evidence to this

effect: Plaintiff had not on any previous occasion cleaned out the hopper. He was directed to do the work on the occasion in question without any warning of the peril of undertaking the task before the knives stopped revolving. They revolved within a little over an inch of the edge of the hopper, and when it was necessary to clean out the hopper the course ordinarily pursued was to stop the machine, waiting till the knives ceased revolving before undertaking to remove the contents of the hopper. The act acquired to stop the machine was to release the tightener resting on the driving belt. That would cause the feed rolls to stop at once, but the knives would continue to revolve for some little time. On the occasion in question plaintiff upon being directed to clean out the hopper released the tightener on the driving belt, thereby stopping the feed rolls and the further communication of motive power to the knives, but without waiting for them to stop revolving by their own momentum he lifted the table of the planer, got down under it and attempted to take hold of the edge of the hopper, when his hand was caught by the knives. The planer was of the ordinary kind. It was equipped with a hood over the knives and one under them with connections to carry away the shavings. The plaintiff had seen the hopper cleaned out on several occasions, though he had not theretofore done it himself. He had observed a buzzing sound when the machine was in operation planing lumber. He had observed that the boards were put into the machine on one side in the rough and came out on the other planed, and knew that something, during their passage through the machine, took off the shavings. He had seen knives which he understood belonged to the planer. He knew that some sharp instrument in the inside of the planer took off shavings from the boards as before indicated. He had often seen the platform of the planer raised up and the under hopper cleaned out. The knives on the machine were frequently filed and changed, at which time they were exposed to view and plaintiff was often where he could

readily have seen them. A person stationed as he was in taking away lumber from the planer could have seen the knives revolve for some little time after the tightener on the driving belt was removed so as to stop the machine. The evidence as a whole, as counsel for appellant conceded on the argument, was quite as strong in defendants' favor on the subject of contributory negligence as on the former trial. There was a special verdict rendered, the jury finding all of the issues in favor of the plaintiff, except that in respect to whether he was guilty of contributory negligence. On that in answer to the second question in the verdict the jury decided that at the time plaintiff attempted to clean out the hopper he did not know of the revolving knives, which were liable to come in contact with his hand if he attempted to take hold of the edge of the hopper before they stopped revolving, and in answer to the fifth question in the verdict the jury decided that the plaintiff was wanting in ordinary care which contributed to produce his injury. Before the jury were discharged they were polled as to their answer to the fifth question.

There was a motion to change the answer to the fifth question to one in favor of the plaintiff and for judgment on the verdict as corrected in his favor, which was denied. Judgment was then rendered in the defendants' favor.

For the appellant there was a brief by *Morris & Hartwell,* attorneys, and *Higbee & Higbee,* of counsel, and oral argument by *E. C. Higbee.*

George H. Gordon, for the respondents.

MARSHALL, J. The foregoing brief statement of the case, especially in connection with the statement on the former appeal (123 Wis. 399, 101 N. W. 935), sufficiently, it is thought, for the purposes of the questions to be decided, shows the situation to which the governing legal principles apply. As indicated, it is conceded by appellant that the evidence bearing on the subject of contributory negligence of the plaint-

iff is as favorable to the respondents now as on the former occasion, while counsel for the latter claim that it is more favorable. It is sufficient to preclude legitimate rediscussion of the matter that as strong ground exists in the evidence for holding that the issue in respect to contributory negligence was for the jury, on the last trial, as on the one that was previously here reviewed, when it was held that the court should have submitted such issue to the jury instead of directing a verdict in favor of the defendants. Since appellant's counsel make no stronger claim than that the records in respect to the subject under discussion are substantially the same, the former decision must be regarded as *res adjudicata* of the question now. The previous holding that on the evidence plaintiff was entitled to have the matter submitted to the jury obviously included the right of defendants to have it so submitted. The rule is that the decision of a question on appeal is *res adjudicata* of the same matter when again presented in the same case upon the same or substantially the same evidence.

In *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563, speaking on the subject above discussed where the question as to contributory negligence upon the first appeal was only there inferentially passed upon, it was said:

"On a former appeal in this case a judgment in plaintiff's favor was reversed and the cause remanded for a new trial. . . . The evidence was the same, substantially, then as now. The question of whether the evidence on such former appeal showed conclusively contributory negligence of plaintiff was raised but not decided in the opinion, though it is considered that the decision was, in effect, that the evidence was sufficient to carry the case to the jury on all the issuable facts as to plaintiff's cause of action. It follows that, the evidence being the same on this appeal, the question of whether there was sufficient evidence to warrant the submission of the case to the jury must be considered foreclosed by the former decision."

To the same effect are *Crouse v. C. & N. W. R. Co.* 104 Wis. 473, 480, 80 N. W. 752; *Darcey v. Farmers' L. Co.* 98

Wis. 573, 74 N. W. 337; *Collins v. Janesville,* 111 Wis. 348, 87 N. W. 241, 1087; *Zimmer v. Fox River Valley E. R. Co.* 123 Wis. 643, 645, 101 N. W. 1099.

From the foregoing it will be readily seen that the proposition as to whether the court erred in not changing the answer of the jury to the fifth question so as to find the appellant free from contributory negligence must be determined in respondents' favor, because, if for no other reason, of the decision of the court on the former appeal.

The court instructed the jury in respect to the fifth question, as follows:

"If the plaintiff knew that there was a rapidly revolving knife or knives at the edge of the lower hopper, that his hand was liable to come in contact therewith in attempting to take hold of the hopper, he must be held to have appreciated the danger and assumed the risk in attempting to do the work, although by the express direction of the defendant."

"The true test as to whether a minor has assumed the ordinary risks of his employment, or is guilty of contributory negligence, is not whether he in fact knew and comprehended the danger, but whether, under the circumstances, he ought to have known and comprehended such danger."

"The defendant had a right to assume that the plaintiff was a person of ordinary common sense for one of his years and that he would exercise such care to avoid dangers which were visible and which he knew, or ought to have known, existed as might be reasonably expected of one of his years and capacity."

It is suggested that such instructions violated the rule that the court should not advise the jury as to the effect of their answers, relying on *Gutzman v. Clancy,* 114 Wis. 589, 90 N. W. 1081, and cases therein referred to. The rule invoked is so familiar that discussion as to its scope seems unnecessary. Counsel do not point out definitely wherein the instructions complained of violate such rule, and we are unable to discover the suggested difficulty. The instructions were not given generally in the case, but with reference to the particular ques-

tion to which they were supposed to apply. That question covered the phase of contributory negligence denominated "assumption of the risk" and negligence of the plaintiff as regards his personal safety inconsistent with that which, considering his age and intelligence, he ought to have known. Therefore, it was legitimate for the court to instruct the jury as to what constituted contributory negligence in those aspects of the case in order that they might answer the question intelligently. The instructions seem to have been given for that purpose and the first two at least to have been appropriate, and the last, if not so, not to have been prejudicially inappropriate.

It is insisted that the court erred in saying to the jury, in effect, that plaintiff assumed the risk as to that which he ought to have known and comprehended, even if it were a fact that he did not know and comprehend the danger. The instruction is in accordance with the settled law on the subject, as we understand it. The authorities cited by the learned counsel for the appellant, rightly understood, support rather than condemn that view. For support of the contrary this language from 20 Am. & Eng. Ency. of Law (2d ed.) 98, is called to our attention:

"Even where the danger is patent or open to observation, it is the duty of the master to warn and instruct in regard to it, if through inexperience, or from any other cause, the servant is incompetent to understand fully and appreciate the nature or extent of the danger."

Note the language, "if through inexperience, or from any other cause, the servant is incompetent to understand," etc. There was no evidence in this case that the plaintiff was not a person of ordinary intelligence and capacity for one of his years. On the contrary, the evidence tended to show that before the accident one would have supposed that he was rather above the average of boys of his age. As indicated in the statement, he was substantially man-grown, he weighed 150

pounds, and further, the evidence indicates that he was quite well advanced in an educational way.

The principles covered by the three instructions, as claimed by counsel for respondents, have been frequently declared by this court in substantially the same words as those used by the learned court. In *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615, 71 N. W. 1034, it was held that a boy eighteen years of age, who had observed the operation of a straw cutter, the knives of which were hidden from view, needed no instruction when put to work at such a machine, that if he allowed his hand to be inserted into the place for feeding in the straw it would be liable to be cut. In *Groth v. Thomann,* 110 Wis. 488, 86 N. W. 178, it was held that a girl fifteen years of age set to work at an ironing device called a mangle, which required her to feed garments into revolving rolls, needed no instruction that if she allowed her fingers to be caught between the rolls she would be injured. It was there said, in effect, that the principle of law is too familiar to be reasonably forgotten by trial courts, that as between master and servant instructions need not be given of the perils of the employment where there is no need of instructions, and that a person of average intelligence of the age of fifteen years must be presumed to know that it is dangerous to allow the hand to be caught between revolving rolls.

The learned court doubtless had in mind in approving of the instructions, as the learned counsel for respondents probably did in draughting them, the following language of this court, which has been many times approved, found in *Helmke v. Thilmany,* 107 Wis. 216, 83 N. W. 360:

"This court has repeatedly held that the true test as to whether a minor has assumed the ordinary risks of his employment, or is guilty of contributory negligence, is not whether he in fact knew and comprehended the danger, but whether, under the circumstances, he ought to have known and comprehended such danger."

It will be seen that such language was adopted *verbatim* in the second instruction. The language of the third instruction, as suggested by respondents' counsel, was taken *verbatim* from the opinion of this court in *Schiefelbein v. Badger P. Co.* 101 Wis. 402, 77 N. W. 742. That has been so frequently approved as to be regarded as elementary law.

The further claim is made that the answer to the fifth question is inconsistent with the answer to the second, the latter finding plaintiff free from contributory negligence, and the former finding the contrary. What has been said sufficiently answers that. The second question was evidently given to cover the subject of whether plaintiff was guilty of contributory negligence, in that he knew, when he took hold of the hopper, of the revolving knives and that they would be liable to cut his hand, while the fifth was given with reference to the broader subject of whether he knew, or ought to have known, and comprehended the danger of there being revolving knives which would be liable to cut his hand if he undertook to take hold of the edge of the hopper as he did. The answers taken together indicate with reasonable certainty that the jury considerately decided that plaintiff did not in fact know of the peril he subjected himself to, but that considering his age and experience he failed to exercise that ordinary care, reasonably to be expected of one of his age, in not knowing of and comprehending such peril.

We are unable to discover any error in the record.

By the Court.—The judgment is affirmed.

CASSODAY, C. J., took no part.

LISTMAN MILL COMPANY, Appellant, vs. MILLER, Respondent.

March 23—April 9, 1907.

Sales: Implied warranty: Goods delivered: Conformity to contract: Court and jury: Evidence: Opinions: Improper remarks of counsel.

1. Upon an agreement to sell and deliver a quantity of "No. 2 screenings," to be the future output of the vendor's flour mill for about two months,—such screenings being a by-product resulting incidentally from the manufacture of flour,—there was no implied warranty that the screenings so sold would be of the same quality as those being produced at the time the contract was made.
2. Upon the evidence in this case the question whether the commodity delivered by the vendor was actually the "No. 2 screenings" from the mill during the period specified, is *held* to have been one for the jury.
3. As to such question it was proper to admit evidence descriptive of the process established and in operation in the mill, and samples or description of the commodity delivered, to show that such commodity could not have resulted from the process described.
4. A statement by the vendee, in his testimony describing the goods delivered, that they were not No. 2 screenings, is *held* not so clearly an attempt to give his nonexpert opinion upon the question which the jury were to answer that its admission, not specifically objected to upon that ground, can be said to have been an error warranting reversal.
5. In an action upon a contract for the sale of screenings thereafter to be produced in plaintiff's flour mill, where the court had excluded samples offered in evidence as having been shown to defendant when the contract was made, remarks of defendant's counsel in his argument to the jury, commenting on plaintiff's efforts to exclude such samples from the observation and consideration of the jury, are *held* improper; but the trial court having promptly suppressed such comments, commanded counsel to confine himself to the evidence which had been admitted, and ruled that the jury had no right to infer what such samples might be, and having thereafter decided that plaintiff was not so prejudiced that a new trial should be granted, this court does not deem such conduct of counsel a ground for reversal.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

The plaintiff, a corporation engaged in operating a flouring mill at La Crosse, Wisconsin, and the defendant, a sheep feeder at Winona, Minnesota, entered into a written contract whereby the plaintiff agreed to sell and the defendant to buy "280 tons bulk No. 2 screenings (more or less) at $10 ton f. o. b. La Crosse. To be our output from February 5th until April 1, 1906 (excepting about 63 tons still due John E. Erickson)." The plaintiff from time to time shipped what it claimed to be No. 2 screenings, resulting from the operation of its mill, to the defendant at Winona, who refused to receive the same, whereupon plaintiff sold in open market, the net proceeds being less than the contract price by $947.42. Suit being brought upon the breach of the contract to recover this damage, defendant, as defense, denied everything except an agreement to purchase plaintiff's output of No. 2 screenings, and also set up, by way of equitable counterclaim, that the contract was intended to provide for a sale of screenings to accord with a sample, and prayed reformation accordingly. The equitable issue was tried first to the court and findings made against the defendant and reformation denied. Thereupon the case was tried to a jury.

Plaintiff's manager testified to the shipments in accordance with the allegations of the complaint of the whole product in its mill classed as No. 2 screenings. Defendant gave evidence that before the making of the contract plaintiff took him into the mill and showed him the various kinds of screenings which resulted from its operation and explained the process. As result of comparison with that which he saw in the mill, and the process by which it was produced, defendant testified that the stuff shipped him was not such No. 2 screenings. The word "screenings" applies generally to the refuse excluded from the wheat which is to be ground and is a by-product. No. 1 screenings were said to be composed mainly of broken

wheat and to be sold at a higher price than No. 2, chiefly for chicken feed. No. 2 was a general refuse remaining after the elimination of No. 1 and after the elimination of oats, flax seed, and mustard seed, and, as defendant claimed, after elimination of the dust.

After overruling a motion to direct a verdict in the plaintiff's favor the court submitted to the jury a single question, answered in the negative, as follows: "Did the plaintiff deliver to the defendant the bulk No. 2 screenings which were the output of its mill from February 5, 1906, to April 1, 1906, excepting about sixty-three tons due one John E. Erickson, previously contracted by the plaintiff to said Erickson?" After overruling motion for judgment notwithstanding the verdict, and for a new trial, judgment was entered in favor of the defendant, from which plaintiff appeals.

George H. Gordon, for the appellant.

For the respondent there was a brief by *Webber & Lees,* and oral argument by *E. E. Lees.*

DODGE, J. 1. This was obviously a contract for the purchase of a by-product resulting incidentally from plaintiff's principal business of manufacturing flour. A purchaser could have no rational expectation that the operation of a mill for the production of such valuable product would be varied or restrained by any consideration for the quality of the refuse thrown off in such process. Hence there was no implied warranty on the seller's part that the screenings which would result in the future should be of the same quality as those resulting at the time the contract was made. All that plaintiff agreed to sell and deliver was that which in fact resulted from an established and existing process. The only direct evidence as to whether the commodity delivered did so result must of necessity come from plaintiff's employees, who alone saw it produced, and their evidence is all to the effect that the property delivered did actually so result. But direct evidence may

be overborne by circumstantial. If one of these cars contained clear sawdust, that fact would convince any one that its contents were not screenings from a flouring mill, and doubtless some less degree of inconsistency with that which ordinarily and necessarily results from screening wheat might suffice to satisfy a jury that a commodity could not have resulted from such a process. There was verbal testimony descriptive of that which was contained in the cars sent defendant tending to show that it did not present those seeds and grains usually and uniformly characterizing wheat screenings; that it was mere chaff and dirt. In addition, however, there was exhibited in evidence samples of the contents of each car. Those samples are not before this court. They might have been such as to convince one examining them that they could not result from a process such as was followed in plaintiff's mill, of which some description was in evidence. We therefore cannot say that error was committed in leaving that question to the jury, or in refusing to reverse their negative finding upon it, which is the first assignment of error.

2. The second class of assignments of error are upon admission of evidence offered by defendant, consisting first in description of the process established and in operation in plaintiff's mill, based partly on the observation of the witness, but mainly upon statements made by plaintiff's manager in the course and scope of his management of the plaintiff's business so as to qualify them as admissions (*Hupfer v. Nat. D. Co.* 119 Wis. 417, 96 N. W. 809; *Kamp v. Coxe Bros. & Co.* 122 Wis. 206, 99 N. W. 366); secondly, in the samples of the contents of the several cars shipped to defendant; and, thirdly, in the testimony of defendant himself that the contents of such cars were not Listman's No. 2 bulk screenings. We can discover no reason for excluding either the first or second phases of this evidence. It was competent to show what the mill process was, in order to judge what character of product would result. Having done so, it was competent to

show that the commodity tendered could not, and therefore did not, result from the process described. To that end description of such commodity was obviously relevant, either verbal description or exhibition of the samples, the fairly typical character of which was established.

Certain possible aspects of defendant's testimony admitted over objection present questions of more doubt. Thus at one time he was allowed to testify that he examined carefully what plaintiff showed him as No. 2 screenings at the time of negotiating contract, and in immediate connection therewith to testify that none of the cars contained No. 2 screenings. This, we confess, looks like an insidious attempt by counsel to get to the jury comparison between a sample exhibited prior to the contract and the article delivered, which the court again and again ruled improper. But, even were that so, we cannot discover prejudice, for no such question was submitted to the jury. Again, we have been troubled whether the testimony of defendant that the contents of the cars were not No. 2 screenings was not merely the giving of his conclusion or opinion as to the very question the jury were to answer upon all the facts, and that, too, without any showing of expert qualifications in the way of special or peculiar knowledge. No such objection was specified or is now urged by appellant's counsel, and we have reached the conclusion that this objectionable quality does not appear with sufficient certainty to warrant reversal. It was proper for defendant to describe the commodity sent him, and the context in which this particular statement was made gives color to the probability that the witness's statements that these were not No. 2 screenings were understood merely as a part of his description of their characteristics, and not as an attempt to state his opinion as to their source, of which he freely admitted he had no direct knowledge. We are persuaded that prejudicial error is not made to appear in the admission of evidence.

3. Certain remarks of counsel for defendant in argument

to the jury were made a basis for the motion for new trial and are now pressed as ground of reversal. Most of them consist in rather extreme language expressing the contention of counsel that the samples of the commodity shipped to the defendant ought to convince any one that they were mere sweepings, and that if, as was made to appear, the plaintiff's process involved the removal of dirt from the screenings, it was the dirt and not the screenings that had been shipped to the defendant. We are unable to say that this is trespassing beyond the limits of legitimate contention as to the inference or conclusion which might be drawn from the evidence. The most reprehensible of the remarks criticised is the comment to the jury upon the efforts of the plaintiff to exclude from their observation and consideration a sample of screenings which had been shown the defendant at the time of or before the contract was made. An attempt by innuendo or otherwise to suggest to the jury that evidence which the court properly excludes upon the objection of the opposing party would have been injurious to the latter, and thus to seek to arouse suspicion of weakness in the party's case not resting upon evidence, is most improper; but it appears by the record that the trial court promptly suppressed such attempts and commanded counsel to confine himself to the evidence which had been admitted, and ruled that the jury had no right to infer what such samples might be. With this record and with the aid of the trial court's conclusion that prejudice had not occurred to the appellant warranting a new trial, we cannot feel justified in deeming even this conduct of counsel ground of reversal. See *Kiekhoefer v. Hidershide,* 113 Wis. 280, 291, 89 N. W. 189.

By the Court.—Judgment affirmed.

CASSODAY, C. J., took no part.

HAYES, Administrator, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

March 25—April 9, 1907.

Railroads: Negligence: Killing of brakeman between cars: Contributory negligence: Court and jury: Instructions: Excessive damages.

1. In an action for the death of a brakeman who was crushed between two freight cars, the evidence is *held* sufficient to sustain a verdict to the effect that the cars were detached and standing still when the deceased went between them, and that the accident was caused by negligence of defendant's other employees in backing one of the cars upon him.
2. An instruction to the effect that deceased was not guilty of contributory negligence preventing a recovery if in performing his work about the train he acted as the great mass of men act under like or similar circumstances, is *held* proper when taken in connection with the whole charge, the idea being clearly conveyed that he must have been doing his work in accordance with instructions and as the great mass of men would act under the same or similar circumstances in view of the duties which he was to perform and the instructions which had been given.
3. An instruction that, in determining whether the deceased was guilty of contributory negligence, his age, intelligence, and experience as a brakeman were to be taken into account, was proper.
4. An instruction to the effect that if the jury found that a certain employee gave the back-up signal while deceased was between the cars, which was obeyed and the deceased thereby injured, they might find the defendant negligent, is *held*, in view of the evidence, not to have been prejudicially erroneous.
5. The whole subject of contributory negligence having been fully and properly covered by the general charge, it was not error to refuse a requested instruction to the effect that if deceased went between the cars while they were still moving and was caught between the couplings as described, as and when the cars stopped, the verdict should be for defendant.
6. Such instruction was properly refused, also, because there was evidence that deceased went between the cars just as they stopped—that they came to a standstill within a foot, and that thereafter one of them was backed upon him without warning. Under such circumstances he could not be held guilty of contributory negligence as a matter of law.

7. An award of $3,500 as damages for the death of a brakeman about eighteen years old who was earning $80 per month and whose parents, sixty-one and fifty-two years old respectively, were in poor health and largely dependent on him for support, is *held* not excessive.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

On January 2, 1905, Joseph L. Hayes, plaintiff's decedent, was killed at Sparta, Wisconsin, by being crushed between the drawbars of two freight cars. He was at the time of his death between eighteen and nineteen years of age, and head brakeman on the freight train which left La Crosse, Wisconsin, for the east about 5 o'clock and arrived at Sparta on the morning of the injury. The freight train upon which he was employed consisted of a long string of freight cars, the second and fourth of which from the engine were to be set out at Sparta, and the first and third were to go on with the train. While the train crew was switching for the purpose of setting out the two cars named and making up the main train, the deceased was crushed between two cars, and the main controverted question of fact is whether the cars were in motion when the deceased went between them and was injured, from which injuries he died.

The cars were equipped with a device for uncoupling, by the use of which the brakeman could by means of a lever on the side of the car uncouple without going between them. The cars were also supplied with a system of air brakes, which consisted of hose and pipes extending through the train, the hose being between the cars connecting in the form of a loop and coupling at the bottom of the loop below the drawbars. There were also what are known as "angle cocks" in the air pipes between the cars, to which the hose was attached, by means of which the air can be shut off or let on as required. The deceased was found caught between the drawbars of the second and third cars, and the contention on the part of the

defendant is that deceased was guilty of contributory negligence in going between the cars while they were in motion, and that defendant was not guilty of negligence. On the part of the plaintiff it is contended that deceased went between the second and third cars while they were standing still and about six feet apart, the third car being detached from the second; and that without any signal or warning the engine and two cars attached to it were backed upon deceased, in consequence of which he was crushed between the second and third cars.

The deceased left a father and mother, brothers, and a sister. The action was brought by plaintiff, as administrator, to recover $5,000 damages sustained by the death of Hayes. Motions on the part of defendant for nonsuit and directed verdict were denied. The case was submitted to the jury, and they rendered a general verdict in favor of the plaintiff for $3,500. Motion for new trial was denied, and judgment rendered for plaintiff on the verdict, from which this appeal was taken. It is claimed by appellant (1) that a verdict should have been directed for defendant, (2) that the court erred in instructing the jury and in refusing to instruct, and (3) that the damages are excessive.

For the appellant there was a brief by *Woodward & Lees*, attorneys, and *Chas. E. Vroman*, of counsel, and oral argument by *Mr. John B. Sanborn* and *Mr. Vroman*.

For the respondent there was a brief by *Morris & Hartwell* and *Winter & Esch*, and oral argument by *Frank Winter*.

KERWIN, J. 1. The main contention by appellant is that deceased was guilty of contributory negligence in going between the cars while they were in motion, and that the fact that they were in motion when he went between the cars was established as a matter of law. Conceding, as claimed by appellant, that deceased was instructed not to go between the cars while in motion for the purpose of performing his duties as brake-

man, and that suitable appliances were provided for such work, rendering it unnecessary to do so, it is by no means clear that it would be negligence *per se* for deceased to go between them, as testified to by some of the witnesses, when they were moving so slowly as to be practically at a standstill. It does not appear for what purpose he went between the cars, and we think an occasion might arise which would present a question for the jury whether negligence or not. But we do not find it necessary to pass upon the question here, because we think upon the evidence the question whether the cars were standing still when deceased went between them was for the jury. The case was squarely presented to the jury upon the issue as to whether or not the cars were standing still when deceased went between them, and while in such position the engine and two cars were backed against the third car, thereby crushing deceased. Other questions found by the jury respecting the right to recover are not questioned. So we reach the question of the sufficiency of the evidence to support the verdict upon the point whether the cars were standing still when deceased went between them and was injured by the negligence of the employees of defendant in backing the cars upon him.

The appellant's theory is that while the cars were in motion deceased went between the second and third cars attached to the engine for the purpose of closing the angle cocks on the air pipes and breaking the hose coupling, and that he was injured while the cars were in motion; that he should have done this work while the cars were standing still, and that the uncoupling should be done with the appliances provided for that purpose without going between the cars. There is testimony tending to show that after the fourth car was set off, or "spotted," the engine and the three remaining cars with deceased hanging on the side of the third car pulled east over the bridge switch, and that Hayes dropped off, turned the switch to the main line, and gave the signal to back up, which was imme-

diately obeyed, and that in this backing-up movement the engine did not again fully stop until after Hayes had been crushed between the second and third cars. This evidence, however, is in direct conflict with the evidence of Mrs. Flickiger and her daughter, who testified that they were on the piazza of their residence, about ten rods from the place of injury, and saw the accident and heard Hayes scream, and that the cars had stopped and the second and third cars were about six feet apart, Hayes between them fixing something on the rear of the third car when the engine and two cars backed upon him. A vigorous attack is made upon the credibility of this evidence by appellant on several grounds. It is claimed that the physical conditions surrounding the witnesses rendered their testimony incredible and impossible. This claim is based mainly upon the assumption that the Flickigers could not see the place where the injury occurred on account of a billboard obstructing their view, and, further, that their testimony was rendered incredible by other established facts and evidence. We shall not attempt to enter into a review of the argument of counsel upon this question of fact at any considerable length. They make the point that the brakeman did not hear the screams of Hayes, although but 100 feet from him; that Mrs. Flickiger swore Hayes was facing the west, or toward the third car, when he was crushed, while the testimony conclusively shows that when found he was facing the east; that both Mrs. Flickiger and her daughter, immediately after they saw the cars backed upon Hayes and heard the screams, went into the house and saw nothing further; that they did not know Hayes; that doubtless their testimony referred to the time Long, another brakeman, coupled up the cars about half an hour after Hayes was injured. But it appears that their attention was called to Mr. Long at the trial and they stated he was much shorter than Hayes.

It is true there are many facts and circumstances which tend quite strongly to establish the position of the appellant to

the effect that the Flickigers may have been mistaken, and that instead of seeing deceased Hayes crushed they saw Long when he went between the cars to couple them about half an hour after the injury and Hayes had been removed from the scene of injury. But we do not think that it is by any means so conclusively established as to warrant this court in disturbing not only the findings of the jury upon the question, but of the court below as well, who tried the case, saw the witnesses upon the stand, and had opportunity to judge better of their credibility and of all the facts and circumstances surrounding the transaction than this court. So far as the evidence shows, the Flickigers were wholly disinterested witnesses, and if they were in position, as they claim they were, to see the deceased when the car was backed upon him, this court cannot disregard their evidence. Nor do we think the established facts were such as to render their testimony incredible. Whether the billboard was an obstruction or not depended entirely upon the location of the train. It may be that if it was located as claimed by appellant the billboard might have obstructed the view, but it by no means follows that the testimony is conclusive that it was so located. We think the evidence is ample to support a finding that the train was so located as not to prevent the Flickigers from seeing the point of injury from their position on the piazza, as testified to by them. Considerable stress is placed upon the fact that when Hayes was found he was facing the east, while the Flickigers testified that when they saw the car backed upon him he was facing west. It may well be that he was facing west and attending to something on the third car, and yet he may have been partially facing the drawbars, and instantly, when the car was backed upon him, turned toward it, and in that way was crushed between the cars with his face to the east. At any rate these questions, we think, were all for the jury. Just what movements Hayes made immediately before he was crushed do not appear, as Mrs. Flickiger does not say, but only saw the car backed upon him and heard him scream. So it is not at all

improbable that his face was turned to the west when she saw him as she testified to, and that almost instantly when the car backed upon him he turned towards it and was crushed between the drawbars, and found in the position testified to, facing the east.

But it is wholly unnecessary to discuss this question further, or prolong the opinion by the recital of testimony or discussion of probabilities or improbabilities claimed on either side. After a careful examination of the evidence we are well satisfied that there is ample evidence to support a verdict that the deceased went between the second and third cars when the third car was detached and the cars standing still, and that without any warning the agents of defendant backed the engine and two cars upon him, whereby he was crushed between the drawbars, which caused his death, and hence the court was right in refusing to nonsuit the plaintiff or direct a verdict in favor of the defendant.

2. It is also insisted that the court erred in its charge to the jury and in refusing to charge as requested by defendant. Exceptions were taken to the following:

"The court instructs you that if Joseph Hayes, in performing his work about the train at and before his death, acted as the great mass of men act under like or similar circumstances, then there was no such contributory negligence on the part of Joseph Hayes as would prevent a recovery in this action."

It is claimed that the court ignored all the evidence as to the manner in which the coupling and uncoupling of cars supplied with air and safety appliances should be done, and also the instruction given relative to Hayes's work. But we do not think the instruction susceptible of criticism when viewed in the light of the balance of the charge. We think the portion of the charge excepted to, when read with the whole charge, clearly conveyed the idea to the jury that Hayes must have been doing his work in accordance with instructions and as the great mass of men would act under the same or similar circumstances in view of the duties which he was to perform

and the instructions given in that regard in order to be free from negligence. It was wholly unnecessary to go into a detailed statement to the jury of what the same or similar circumstances referred to were. *Nass v. Schulz,* 105 Wis. 146, 150, 151, 81 N. W. 133; *Duthie v. Washburn,* 87 Wis. 231, 233, 58 N. W. 380; *Innes v. Milwaukee,* 96 Wis. 170, 174, 175, 70 N. W. 1064.

Exception is also taken to the instruction to the effect that in deciding whether Hayes was guilty of contributory negligence the jury will take into account "many other things, his age, intelligence, and experience as a brakeman," and also to the instruction to the effect that if they found from the evidence that Smith gave the back-up signal while Hayes was between the cars, which was obeyed and Hayes thereby hurt, the jury might find the defendant negligent. It is insisted that Smith was not near the cars when the accident happened, nor in sight of the fireman, who was at the time taking signals. It is very obvious that if the engine and cars were backed up upon the deceased, as there is evidence tending to show they were, it was done through the agency of some of the employees in charge of the train, and whether it was Smith or the fireman or the engineer is wholly immaterial. Besides, there are many facts and circumstances appearing in the record which strongly tend to show that Smith may have given the signal for the train to back up. In any event we think it clear that these instructions were not prejudicial.

Counsel also excepted to other portions of the charge respecting the instructions given by the court as to the burden of proof and the negligence of the defendant. But we think there is no reversible error in the charge in this regard.

The defendant requested the court to give the following instruction, which was refused:

"You are instructed that if you find from the evidence that the deceased went between the cars in question while they were still moving and was caught between the couplings as

described, as and when the cars stopped, your verdict must be for the defendant."

It is very plain from the evidence that this request was properly refused. Whether or not it would be negligence as matter of law for a brakeman under any circumstances to go between cars equipped as these were, when moving, is a very serious question, far-reaching in its consequences, and embodies a rule which should not be laid down except upon thorough presentation of all the facts. The record before us shows no such case. Moreover, the instruction was clearly not applicable to the evidence, and, besides, the whole subject of contributory negligence on the part of the deceased was fully and properly covered by the judge's charge. The request above quoted and refused might well have been understood by the jury to allow them to find for defendant even if deceased went between the cars just as they stopped, regardless of whether they were again moved upon him without signal or warning, and even though there was no risk whatever in going between the cars at the time deceased did so, and although such act was not in fact the proximate cause of the injury. The material question under the evidence was whether the engine and two cars were backed upon the deceased without any signal from Hayes or warning to him, and the jury were instructed, at the request of the defendant, that if the cars were not so backed down after coming to a stop their verdict must be for defendant. Whether this instruction, requested by defendant and given by the court, would have been sufficient to reverse had judgment gone for defendant, we need not stop to inquire. It was certainly a very favorable instruction to defendant. There is evidence that deceased went between the cars just as they stopped—that they came to a standstill within a foot after he entered the space between the cars. If this evidence be true, we think it clear that he was not guilty of contributory negligence as matter of law in going between them at the time and under such circumstances, in the absence of any show-

ing other than what was made in the case. And we think it equally clear that the contributory negligence of the deceased upon the evidence in the case was for the jury. *Curtis v. C. & N. W. R. Co.* 95 Wis. 460, 70 N. W. 665; *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109, 74 N. W. 554.

3. Error is assigned because the verdict is excessive, and upon this point we are cited by counsel for appellant to two cases in this court: *Rudiger v. C., St. P., M. & O. R. Co.* 101 Wis. 292, 77 N. W. 169, and *Innes v. Milwaukee,* 103 Wis. 582, 79 N. W. 783. It is true that the verdict in this case is quite a substantial one in view of the facts of the case. The father, as administrator, brings this action. He is sixty-one years of age, in poor health, without property, and was largely dependent upon deceased for support. His wife is fifty-two years of age, is practically an invalid, and they have a crippled daughter dependent upon them for support. They also have surviving three other sons, one of whom is also a cripple, having lost the use of his arm. The deceased was the youngest son of plaintiff, being at the time of the injury about eighteen years and two months old, the other sons being of age. The deceased had not been emancipated, and his father looked to him for assistance, and from the established facts had reason to believe that deceased would continue to render him aid after he became of age. Deceased was earning $80 a month at the time of the injury, with prospects of advance in his wages. The earnings of the deceased until he arrived at majority belonged to the plaintiff, and, as will be seen, would aggregate a very substantial part of the amount of the verdict. Besides, the jury were justified upon the evidence in finding that the deceased would continue to assist his father after having arrived at majority, and were warranted in taking this into account in arriving at their verdict. *Bright v. Barnett & R. Co.* 88 Wis. 299, 60 N. W. 418; *Thompson v. Johnston Bros. Co.* 86 Wis. 576, 57 N. W. 298. We have carefully examined the cases cited by appellant and cannot discover that

they are applicable to the facts in this case. The question of whether the verdict is excessive was presented to the trial court on motion for new trial and fully considered, and held not excessive. Considerable deference is due to the judgment and discretion of the trial court in such matters. *Bright v. Barnett & R. Co., supra.* After careful examination of the evidence we are inclined to agree with the trial court that the verdict is not excessive.

We find no reversible error in the record, therefore conclude that the judgment should be affirmed.

By the Court.—Judgment of the court below is affirmed.

CASSODAY, C. J., took no part.

OLIVER and another, Respondents, vs. KATZ, Appellant.

March 25—April 9, 1907.

Appeal: Facts assumed: Brokers: Commission for procuring buyer of land: Time limited: Court and jury: Evidence.

1. Where a jury has returned a general verdict upon controverted facts relative to an oral contract, for the purpose of assigning and considering errors it must be taken that the facts are those in evidence which are most favorable to sustain the verdict of the jury.
2. In an action by brokers to recover a commission on sale of land, upon the evidence—conflicting as to whether the agreement was to pay a commission for procuring a buyer or for making a sale, and showing, among other things, that after the making of the agreement, when a prospective buyer produced by the brokers insisted upon time to consider, the owner said he would give such buyer a week in which to make up his mind, and that, in a letter written seven days later, the owner recognized the offer as still subsisting—it is *held* that the terms of the original contract and whether there was thereafter a limitation upon the time for procuring a buyer were questions for the jury.

3. Upon evidence showing, also, that, after the brokers had written to the owner that the buyer above mentioned would not purchase at that time, their agent saw said buyer and urged him to proceed with the matter and that a short time thereafter he did buy the land from the owner, it is *held* that the jury were justified in finding that the brokers did procure a purchaser upon terms satisfactory to the owner and within a reasonable time.
4. Where the owner of land agrees to pay a commission to a broker for procuring a buyer, and a buyer is procured by the broker but refuses to pay the price asked by the owner, if the owner afterwards, during the continuance of the broker's agency, sells to the person so procured at a lower figure he is nevertheless liable for the commission.
5. If no time is limited for procuring a buyer the broker is entitled to a reasonable time, and what is a reasonable time, under all the circumstances, is a question for the jury.
6. The fact that the buyer consulted another person besides the brokers in the matter and had resolved not to buy unless that person approved of the purchase is immaterial upon the question whether the brokers' efforts were the procuring cause of the sale.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

The appeal is from a judgment for $225, interest and costs in an action for breach of a commission contract upon sale of real estate. The appellant assigns as error: (1) The refusal of a nonsuit; (2) the refusal to direct a verdict for defendant; (3) the refusal to grant a new trial; (4) errors in refusing and in giving instructions to the jury; (5) error in the exclusion of evidence.

For the appellant there was a brief by *Goggins & Brazeau,* and oral argument by *T. W. Brazeau.* They contended, *inter alia,* that even if the plaintiffs had not abandoned the contract and their time had not been limited, defendant, by selling to Frost on different terms than those upon which plaintiffs were to sell, did not become liable for commission unless he knew that Frost was able, ready, and willing to buy upon the terms proposed to plaintiffs. *McArthur v. Slauson,* 53 Wis. 41, dis-

tinguishing *Stewart v. Mather,* 32 Wis. 344; *Cullen v. Bell,* 43 Minn. 226; *Fairchild v. Cunningham,* 84 Minn. 521; *McGuire v. Carlson,* 61 Ill. App. 297; *Ryan v. Page,* 123 Iowa, 246; *Ames v. Lamont,* 107 Wis. 531. But after abandoning the contract as plaintiffs did on December 19th, the defendant selling on different terms, plaintiffs certainly were not entitled to commission. *Trickey v. Crowe* (Ariz.) 71 Pac. 965; *Watts v. Howard,* 51 Ill. App. 243; *Cullen v. Bell,* 43 Minn. 226; *Tooker v. Duckworth,* 107 Mo. App. 231. Plaintiffs were not entitled to a commission upon a subsequent sale by defendant in the absence of fraud, even though defendant sold to one with whom plaintiffs were negotiating before their time expired. *Ames v. Lamont,* 107 Wis. 531; *Learned v. McCoy,* 4 Ind. App. 238; *Antisdel v. Canfield,* 119 Mich. 229; *Fultz v. Wimer,* 34 Kan. 576; *Castner v. Richardson,* 18 Colo. 496; *Watson v. Brooks,* 11 Oreg. 271; *Zeimer v. Antisdel,* 75 Cal. 509; *Farrar v. Brodt,* 35 Ill. App. 617. If, after refusing to buy, Frost through his friend Bean's recommendation and defendant's own efforts or for any reason of his own subsequently changed his mind and became willing to purchase, it would not entitle plaintiffs to a commission. *Lipe v. Ludewick,* 14 Ill. App. 372; *Wylie v. Marine Nat. Bank,* 61 N. Y. 415; *Sibbald v. Bethlehem I. Co.* 83 N. Y. 378, 383; *Moses v. Bierling,* 31 N. Y. 462; *Moore v. Cresap,* 109 Iowa, 749; *Earp v. Cummins,* 54 Pa. St. 394; *Fairchild v. Cunningham,* 84 Minn. 521; *Francis v. Eddy,* 49 Minn. 447; *Willey v. Rutherford,* 108 Wis. 35; *Wis. F. L. Co. v. Bullard,* 119 Wis. 320.

For the respondents there was a brief by *Holt & Coombs,* and oral argument by *A. N. Coombs.* They argued, among other things, that the case was in all respects properly submitted to the jury. *Schultz v. Eberle,* 124 Wis. 594. It is sufficient if the agent procured a purchaser at a satisfactory price. *Hubachek v. Hazzard,* 83 Minn. 437, 86 N. W. 426; *Willes v. Smith,* 77 Wis. 81; *Delaplaine v. Turnley,* 44 Wis. 31, 41;

O'Connor v. Semple, 57 Wis. 243; *Vreeland v. Vetterlein,* 33 N. J. Law, 247, 249.

TIMLIN, J. Quoting from appellant's brief:

"On December 8th *Oliver,* in company with Frost, while on their way to look at other farms, met the defendant *Katz* on the road, and *Oliver* asked him if his farm was for sale. Defendant told *Oliver* that it was and fixed the price at $4,500, of which $2,000 was to be paid in cash by the purchaser, plaintiffs to receive five per cent. commission. The same day the defendant limited the time within which the plaintiffs could sell to one week. These terms are undisputed."

If this was an accurate version of the facts in this case the assignments of error 1 to 4 above enumerated would probably be fatal to the judgment; but we do not understand the facts in that way, nor did the trial court so understand them. When a jury has returned a general verdict upon controverted facts relative to an oral contract, for the purpose of assigning and considering errors it must be taken that the facts are those in evidence which are most favorable to sustain the verdict of the jury. From this viewpoint we are unable to declare that the time within which the plaintiffs could sell was limited to one week. We are unable to declare that the terms of the commission contract were undisputed. In the first interview on December 8th, between the plaintiff *Oliver* and defendant, the testimony of said plaintiff is, on this point, that he asked the defendant what amount of commission the latter would give if he, the plaintiff, would procure a buyer, and the defendant said he would allow plaintiff five per cent. This was a contract to procure a buyer to whom the defendant would be willing to sell, the defendant having control of the amount of purchase money and the terms of sale. At a subsequent interview on the same day when the prospective buyer, Frost, was urged to conclude the purchase from *Katz,* he insisted upon first consulting with his wife and having more time, where-

upon the defendant, claiming that he expected another purchaser from Milwaukee, said he would give Frost one week's time within which to make up his mind. Whether this was trade talk between Frost and *Katz,* whether it was something to hurry up Frost, whether it was the time fixed within which *Katz* would keep his then present offer open for acceptance, or whether after that time he would not sell at all, were all questions for the jury. It is hard to see how it can be considered a limitation upon the contract with the plaintiffs to procure a purchaser, made and concluded at a prior interview. But even the question whether it was or not was for the jury. The letter of *Mr. Katz* written on the 15th, seven days after this alleged limitation, when the parties were nearly 100 miles apart, recognizing the offer as still subsisting, although slightly modified by his letter, was competent evidence upon the question of what the parties intended by this oral contract. We must keep in mind that here were two contracts. One was a contract with the plaintiffs to procure a purchaser; the other was a contract in negotiation between the defendant and Frost for the purchase of defendant's farm. We have noticed that the evidence of the plaintiffs stated the commission contract to be one whereby, in consideration of five per centum, they were to procure a purchaser. The defendant does not give the same version of this commission contract because he does not tell it as a contract to procure a purchaser, but rather as a contract to pay a commission for making a sale, and these are materially different engagements. The terms, as well as the construction of an oral contract bound up in these terms, is a question for the jury. *Teesdale v. Bennett,* 123 Wis. 355, 101 N. W. 688. If the contract was to procure a purchaser, and the purchaser was procured by the plaintiffs but refused to buy the property at the price offered by the owner, and the owner would later and during the continuance of plaintiffs' agency sell to the same person so procured at a lower figure, he could not thereby avoid the payment of the agents' commis-

sion. *Hubachek v. Hazzard,* 83 Minn. 437, 86 N. W. 426. The period of the continuance of plaintiffs' agency in the case at bar was a question for the jury. If there was a contract to procure a purchaser, without any specification of time in which to do so, the plaintiffs would have a reasonable time, and what was a reasonable time would be a question for the jury under all the circumstances.

The correspondence between the plaintiffs and defendant, the letter of December 19th in which the plaintiffs informed the defendant that Mr. Frost would not buy now, seems to us to be fairly capable of the construction no doubt given to it by the jury, namely: that it was for the purpose of giving *Mr. Katz* an opportunity to sell to his prospective Milwaukee purchaser and so not cause him to lose the sale of his farm; but that in case he did not sell the plaintiffs were not to cease their efforts to procure a purchaser, either Mr. Frost or some one else. There being evidence before the jury that after the writing of this letter an employee of the plaintiffs met Mr. Frost and urged him to proceed with the purchase, and that later and on January 2d following Mr. Frost did go up to Wood county and close out the purchase, the jury were justified in inferring therefrom that the plaintiffs did procure a purchaser upon terms satisfactory to the defendant and within a reasonable time. It was therefore entirely proper for the court below to deny the motion for a nonsuit, to deny the motion to direct a verdict, and to charge the jury that:

"To entitle the plaintiffs to recover it must affirmatively appear to the satisfaction of your minds that the purchase by Frost was procured to be made solely by the efforts of the plaintiffs and within the time originally agreed upon, if any limit of time was actually made by the defendant, or within such time as plaintiffs were reasonably justified in believing from defendant's acts and communications with them they were authorized to continue their efforts to obtain a purchaser, if you shall find from the evidence that defendant originally limited the said time to one week, but subsequently by his acts,

conversation, and correspondence, or either of them, gave plaintiffs reasonably to understand that he would accept such purchaser within a reasonable time without regard to the previous limitation thereof to one week, if you find that such limitation of one week was in fact a part of the original agreement of the parties. If there was in fact no express limitation of time agreed upon, then the plaintiffs were entitled to a reasonable time in which to procure a purchaser."

This, upon our construction of the evidence, is the true theory upon which the case should have been submitted to the jury, and it renders the criticisms of the charge of the court below and the assignments of error thereon by the appellant unavailing upon this appeal.

Upon the trial the purchaser, Frost, as a witness was asked what was the effect of the recommendation of one Mr. Bean on Frost's determination as to whether to purchase this farm or not. The witness answered: "Well, I thought if he said not to take it that I wouldn't." This answer was stricken out and exception to that ruling preserved, and it is now assigned as error. Whether or not the plaintiffs' efforts were the procuring cause of the sale to Frost by *Katz* is not proved or disproved by evidence that Frost also sought the counsel of a third person and had resolved not to buy the farm unless this third person also approved of the purchase. The ruling was proper.

Finding no error in the record the judgment of the court below must be affirmed.

By the Court.—The judgment of the court below is affirmed.

CASSODAY, C. J., took no part.

FIRST NATIONAL BANK OF OMRO, Appellant, vs. FRANK and others, Respondents.

March 25—April 9, 1907.

Pleading: Cross-complaint: Affirmative relief against plaintiff: Who may demur: Sufficiency: Rights as between defendants liable on note.

1. A cross-complaint under sec. 2656*a*, Stats. (1898), by all the defendants except one L., praying, among other things, that if plaintiff have judgment it be provided therein that execution be issued first against said L. and not against the other defendants until the remedy against L. be exhausted, demands affirmative relief against the plaintiff.
2. Even though a cross-complaint does not demand affirmative relief against the plaintiff he may demur thereto, under sec. 2658, Stats. (1898). The clause in sec. 2656*a* providing that the party against whom affirmative relief is demanded may demur was intended to make it certain that a codefendant affected by the relief sought should have that right, which is not elsewhere given.
3. In an action upon a promissory note, facts showing that as between the defendants one of them should pay the note and that in case the judgment cannot be collected from him the others should be subrogated to the plaintiff's right are sufficient for a cross-complaint.

APPEAL from an order of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Hanna & Sicklesteel,* and for the respondents on that of *McFarland & Murat.*

WINSLOW, J. This is an action upon a promissory note for $500 executed by the defendant *Frank* to the defendant *Walters,* and indorsed by the defendants *Walters, Bourn, Macnish,* and Lorenze, of which note the plaintiff claims to be the owner in due course. The defendants *Frank, Walters, Bourn,* and *Macnish* answered jointly, denying the plaintiff's ownership of the note, and alleging in substance by way of cross-

complaint that they gave and indorsed the note without consideration, but for the use and benefit only of a corporation known as the Central City Oil Company, and in reliance upon certain false and fraudulent representations made to them by the defendant Lorenze as to the productiveness and value of certain oil-land leases in Oklahoma about to be purchased by said company, and that had said representations been true the said company would have been able to pay said note at maturity and would have saved the defendants harmless therefrom. The prayer of the cross-complaint was to the effect that if the plaintiff obtain judgment such judgment provide for the issuance of execution first against Lorenze, and that if the answering defendants be compelled to pay the same or any part thereof they be subrogated to plaintiff's rights on the judgment. The plaintiff demurred to that part of the answer containing the alleged cross-complaint on the ground that it does not state facts sufficient to constitute a cross-complaint, and appeals from an order overruling the demurrer.

The ruling of the trial court was unquestionably right. The respondents contend that the plaintiff cannot demur to the cross-complaint because no relief is demanded against the plaintiff. This contention is based upon that part of sec. 2656*a*, Stats. (1898), providing for cross-complaints, which says that the party against whom affirmative relief is demanded in a cross-complaint may demur thereto; and it is said that this provision is a special and exclusive provision on the subject and that no affirmative relief is demanded against the plaintiff, and hence it cannot be heard to demur. We do not see how it can be rightly said that no affirmative relief is demanded against the plaintiff. In the absence of a cross-complaint the plaintiff, if it recovers against all the defendants, would be entitled to judgment and a single execution against all without regard to their rights as between themselves; but the cross-complaint sets forth facts on which it is claimed that the plaintiff's judgment should contain a limitation requiring

execution to be first issued against Lorenze, and not against the other defendants until the remedy against Lorenze be exhausted. This may well be called affirmative relief against the plaintiff. While it does not affect the plaintiff's right to ultimately collect against all, it substantially affects the form of the judgment, and requires the plaintiff to proceed by execution in an entirely different and more cumbrous way than would otherwise be required.

But, even conceding that affirmative relief is not sought against the plaintiff within the meaning of the statute, we still think that the plaintiff is entitled to demur if the facts alleged in the cross-complaint be not facts which are properly pleadable as such. Any other rule would mean that the defendants could inject into the plaintiff's action any controversy between themselves, whether germane to the plaintiff's cause of action or not, and litigate it, and the plaintiff would be helpless to prevent it. The law contemplates no such anomaly. The clause in sec. 2656*a* providing that the party against whom affirmative relief is demanded may demur to the cross-complaint was evidently intended to make it certain that a codefendant who is affected by the relief asked should have the right to demur, there being no other provision of the Code authorizing a demurrer by one defendant to the pleading of another. But the provisions of the Code insuring the right of the plaintiff to demur to the answer of any defendant, or any separate defense pleaded therein, are ample—sec. 2658, Stats. (1898),—and under them there can be no doubt of the plaintiff's right to challenge the legal sufficiency of a cross-complaint entirely independent of the provisions of sec. 2656*a*.

Passing to the question whether the facts stated are legally sufficient to constitute a cross-complaint we find little difficulty. The statute (sec. 2656*a*) provides that the relief sought by a cross-complaint "must involve or in some manner affect the contract, transaction, or property which is the subject matter of the action," and it may be relief against a codefendant or defendants, or against a codefendant and the

plaintiff, or part of the plaintiffs. This provision is little if anything more than an express recognition of the old equitable principle governing cross-bills, which was really embodied in the Code prior to the passage of the section named, although the term "cross-complaint" was not used. *Kollock v. Scribner,* 98 Wis. 104, 73 N. W. 776. The equitable principle was that the matters set up in a cross-bill must be germane to the matter involved in the original bill, and must be such as it is necessary for the court to have before it in deciding the questions raised in the original suit to enable it to do full and complete justice to all parties before it in respect to the cause of action on which the plaintiff's right rests. 5 Ency. Pl. & Pr. 640, 641.

The facts set forth in the cross-complaint before us fully answer these requirements. If they be proven they demonstrate that, as between the defendants, the answering defendants are entitled to demand that the defendant Lorenze pay the note on which plaintiff sues, and that they be subrogated to the plaintiff's right in case the judgment cannot be collected from Lorenze. This presents really a typical case where, by means of a cross-complaint, full and complete justice can be done to all the parties in a single judgment without prejudicing in any respect the plaintiff's rights. It is quite analogous in its essential features to the case of *Washburn v. Lee,* 128 Wis. 312, 107 N. W. 649, where, in an action at law against sureties upon a town treasurer's bond, it was held that the sureties could by cross-complaint set forth facts showing that the town should be required to first exhaust its remedy against third persons who had wrongfully received the moneys of the town, and that said third persons could be brought in as defendants and a complete adjudication had determining the rights of all parties and granting the sureties the right of subrogation against those primarily liable.

By the Court.—Order affirmed.

CASSODAY, C. J., took no part.

MURPHY, Plaintiff in error, vs. THE STATE, Defendant in error.

March 25—April 9, 1907.

Criminal law and practice: Jurisdiction: Record not remitted from appellate court: Placing cause on calendar: Notice: Discretion of trial court: Change of venue: Immaterial errors: Supreme court: Questions once determined in case.

1. After the expiration of the time within which the clerk of the supreme court is required by sec. 3071, Stats. (1898), to remit the papers in a cause to the circuit court, the circuit court has jurisdiction of the cause even though the record has not been remitted so as to be in its actual possession.
2. The fact that the record in a criminal case had not been remitted to the circuit court when the cause was placed on the trial calendar of that court was a mere irregularity not affecting any substantial right of the defendant, where such record was thereafter remitted and was in the court when the trial was commenced.
3. There being no statute or rule requiring notice to be given of the placing of a criminal cause upon the trial calendar of the circuit court, no such notice to the defendant is necessary.
4. The circumstances under which defendants in criminal cases are to be put upon trial are largely within the discretion of the trial courts, guided by the constitutional guaranties of the right to speedy trial and of reasonable opportunity to prepare and make defense.
5. Error in denying an application for a change of venue on account of the prejudice of the judge was cured or should be disregarded under sec. 2829, Stats. (1898), where such judge on his own motion procured the transfer of the cause to another branch of the court, presided over by another judge, thus giving defendant the relief to which he was entitled on his application.
6. Questions once considered and determined by this court will not be reconsidered when they arise again in the same case, where there is nothing new or different in the record which should operate to change such determination, and nothing is suggested showing that it was erroneous.

ERROR to review a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

The statement of this case given in this court, reported in 124 Wis. 635, 102 N. W. 1087, renders a restatement of the facts therein given unnecessary at this time. The decision in this court reversing the judgment of the trial court and remanding the cause for a new trial was rendered April 5, 1905. Thereupon the defendant, being delivered into the custody of the sheriff of Milwaukee county, was produced by him before the circuit court, and upon a certified copy of the mandate of this court was admitted to bail on April 6, 1905. The clerk of the circuit court placed the case as No. 645 on the trial calendar of the circuit court for the October, 1905, term of the court. When, on November 20, 1905, the case was called for trial, the defendant moved for a continuance of the case until January, 1906, upon the ground that he was not then ready to proceed with the trial. This motion was overruled and the case ordered for trial on November 22, 1905, at 2 o'clock p. m. On November 22d the court directed that the trial be proceeded with, and held it in abeyance until 10 o'clock on the following day. November 23d, at 10 o'clock a. m., the district attorney, in defendant's presence, announced to the court that the record in the case had not been returned to the circuit court, but that on the day previous it had been called for from this court, and that it would probably arrive during the forenoon of that day. Defendant, by his counsel, then moved the court that he be discharged and go without day. This motion was denied and the court suspended further proceedings in the case until 2 o'clock p. m., at which time defendant, by his attorney, objected to being put upon his trial at that time or during the pending term, and asked that the case stand for trial in January, 1906. The record in the case had then arrived from this court and had been on file with the clerk since 10:35 o'clock in the forenoon. The court ruled that the case was properly before the court and subject to call for trial, but ordered a postponement of the trial to the 4th day of December, 1905, at 10 o'clock a. m.

On December 4, 1905, the case was called for trial. At this time defendant interposed the same objections as had theretofore been made. These were overruled, and the defendant then filed an affidavit of prejudice as to Judge TARRANT, then presiding, and under sec. 4680, Stats. (1898), and ch. 2, Laws of 1903, asked that the venue be changed. This application was denied, and the court then of its own motion decided to postpone all proceedings until 2 o'clock of that day for the purpose of conferring with the other judges of the circuit court for Milwaukee county to determine whether the case could properly be transferred to another branch of this court. At 2 o'clock p. m. Judges TARRANT and WILLIAMS appeared in court and announced that they, as the majority of the judges of said court, Judge HALSEY being absent from the state, had determined to transfer this case to branch No. 3 of the circuit court, presided over by Judge WILLIAMS, and ordered the clerk to produce the records and minutes of the proceedings in that branch of this circuit court presided over by Judge WILLIAMS at 10 o'clock the following day, December 5, 1905.

On December 5, 1905, the case was called for trial in branch No. 3 of the circuit court, Judge WILLIAMS presiding. The records in the case and the minutes of the proceedings which had taken place in the branch of the court presided over by Judge TARRANT were produced by the clerk, and the case was moved for further proceedings and trial by the district attorney. Defendant objected, claiming this branch of the court had no power to proceed in the case. The court ordered the trial to proceed.

The trial proceeded before a jury. The plea in bar, to the effect that defendant was entitled to immunity from prosecution because he had testified concerning the transaction covered by the information before the grand jury, was first tried, and thereafter the trial proceeded upon his plea of not guilty. The question of errors in the case pertaining to the proceed-

ing upon this plea in bar was before this court upon certified questions from the trial court, and the proceedings and the decision thereon in this court are fully reported in 128 Wis. 201, 107 N. W. 470. The general issues raised by the plea of not guilty were submitted to the jury upon the evidence and the instructions of the court. The defendant requested the court to give three instructions, which request was refused. These three instructions were also requested in the first trial, and exception to such refusal was urged on review of the case in this court. 124 Wis. 639, 640, 102 N. W. 1087. It was there held that the instructions given by the court covered the issues and correctly informed the jury of the law applicable to the issues and the evidence adduced, and that the refusal to give the requested instructions did not constitute error in the case.

Plaintiff in error prosecutes this writ of error to review the alleged errors and for a reversal of the judgment of conviction and sentence entered on the verdict by the trial court.

J. M. Clarke, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and by *Francis E. McGovern,* of counsel, and oral argument by *W. A. Hayes.*

SIEBECKER, J. When the cause was determined in this court the record was necessarily retained under the rule in this court for the period of thirty days, unless the parties should by consent have it returned sooner. Thereafter it was subject to be returned with the *remittitur* of this court within sixty days from the time the cause was decided by this court. Sec. 3071, Stats. (1898); *Hocks v. Sprangers,* 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113. This court thereafter had no further jurisdiction of the cause. *Estey v. Sheckler,* 36 Wis. 434; *Pringle v. Dunn,* 39 Wis. 435; sec. 2420, Stats. (1898). From this it would seem a necessary conclusion that the circuit court had jurisdiction of the cause at the

time it was placed by the clerk on the calendar of trial causes for the October, 1905, term, though the record of the case may not have been in its actual possession.

The defendant avers that it was not properly on such calendar for want of written notice thereof to him. The only express regulation for placing criminal causes on the trial calendar of circuit courts is that contained in sec. 1 of Circuit Court Rule III, which directs that, in accordance with sec. 2846, Stats. (1898), the clerk shall prepare a calendar for each term and shall place the criminal causes thereon first in order. Sec. 2 of this rule prescribes that no cause shall be placed on such calendar unless a proper note of issue has been filed as required by sec. 2845, Stats. (1898). This section is, however, restricted to causes covered by sec. 2845, Stats. (1898), which embraces civil causes only, and is not regulative of criminal causes. There being no statutory requirement for giving notice or any other regulation respecting criminal causes, common usage prevails, and under this persons may be put upon trial at any time after arrest. The result is that no specific method is prescribed for placing criminal cases on the trial calendar other than that the clerk is directed to place on the calendar all causes pending at the time the calendar is so made up by him. In this instance defendant's case was pending in the circuit court when the clerk was called upon to make up the calendar for the October, 1905, term of the circuit court. The fact that the record had not been returned was, under the circumstances, an irregularity which in no way affected the right of having the cause placed on the calendar, and, since defendant was not deprived of any right or privilege in respect to that step in the procedure, he of course could not be prejudiced thereby. Under what circumstances defendants in criminal cases are to be put upon their trials is deemed largely a question of discretion vested in the trial courts, and they are to be guided by the guaranty that every person prosecuted by indictment or on in-

formation is entitled to a speedy trial and is to be given reasonable opportunity to prepare and make his defense. *Shipley v. State,* 50 Ark. 49, 6 S. W. 226; *Noe v. State,* 4 How. (Miss.) 330; *Page v. Comm.* 27 Grat. 954; 12 Cyc. 504; 14 Am. Dig. 2006. Furthermore, since the record had been returned and was in the actual possession of the court when the trial of the cause was commenced, defendant's complaint that the record was not in court when the case was placed on the calendar and when the case was first called for trial should manifestly be disregarded by the court, because he was in no way affected or prejudiced in any substantial right. Sec. 2829, Stats. (1898).

When the case was called for trial on December 4, 1905, defendant applied for a change of venue on account of the prejudice of the judge before whom the trial was about to commence. The court denied this application upon the ground that, since defendant upon his application upon like grounds had been granted a change of venue from the municipal court to the circuit court, he was not entitled to make this application. The precise question thus presented has since then been passed upon by this court in the case of *State ex rel. Schutz v. Williams,* 127 Wis. 236, 106 N. W. 286, wherein the court held that the defendant had the right to make this second application for a change of venue, and to have it granted if the requirements of the statute were met. Sec. 4680, Stats. (1898). As appears in the foregoing statement of facts, the judge to whom this application was made, and on account of whose prejudice it was made, of his own motion, after denying the application, requested the judges of the circuit court to transfer the cause to another branch of the court, in order that a trial might be had before one of the other judges of the circuit court. Pursuant thereto the cause was transferred by the circuit judges, and the trial was had before Judge WILLIAMS, one of the circuit judges. This action, in effect and substance, resulted in changing the

place of trial of the cause from the court presided over by the judge against whom the prejudice was alleged to a branch of the court presided over by one of the other circuit judges, against whom the cause complained of did not exist. The court's action therefore gave, in fact and substance, the same measure of relief as the law awards defendant upon his application for a change of venue. Although in form the court erred in denying defendant's motion for a change of venue, it in fact and substance did grant it without causing defendant any prejudice, and it must be regarded as an error in the proceeding which did not affect any substantial right of defendant and to be disregarded under the provisions of sec. 2829, Stats. (1898).

We are again asked to consider the errors alleged and arising under sec. 4078, Stats. (Supp. 1906; Laws of 1901, ch. 85), upon the plea in bar respecting defendant's immunity, and which were considered and determined by this court on questions certified by the circuit court, reported in 128 Wis. 201, 107 N. W. 470. No question is now presented nor are any additional matters suggested for consideration bearing upon these alleged errors, nor do we discover anything material to the consideration of them, which was not before the court and considered on the former hearing. We deem the conclusions of that determination decisive of the errors urged, and that the grounds of that decision are sufficiently embodied in the decision of those questions.

The defendant contends that the court erred in ruling that the evidence was sufficient under the information filed to sustain a conviction and in refusing to give certain instructions requested by him. An examination of the evidence persuades us that there is no substantial difference, as to the facts it tends to establish and all the reasonable inferences permitted to be drawn from them by the jury, in the evidence adduced upon the present trial from that of the first trial. Upon review of the first trial the question of the insufficiency of the

evidence to sustain the conviction was urged, as it is now. It was there held that the jury were justified in concluding that defendant must have received some of the money specified in the charges against him with an understanding that he so received it for the purpose of influencing his vote or official action as a member of the common council. We discover nothing new or different in the record which can operate to change the conclusion then reached, and are of the opinion that the court ruled correctly on this question.

A like situation is presented as to the requests for instructions. Three of these requests were rejected on the first trial, and it was held on appeal that they were not erroneously rejected, in view of the instructions given by the court. The court upon this trial gave the same instructions as were given on the first trial. As above stated, nothing new developed as to the issues covered by the instructions; nor is anything suggested showing the former ruling sustaining the action of the trial court to have been erroneous.

We find no reversible error in the record.

By the Court.—Judgment affirmed.

CASSODAY, C. J., took no part.

DAHLMAN and another, Respondents, vs. CITY OF MILWAUKEE, Appellant.

January 8—April 30, 1907.

(1-4) *Municipal corporations: Improvements: Invalid assessments: Reassessment: Statutes construed: Milwaukee: Constitutional law: Vested rights: Damages from grading street: Taking of land for public use.* (5, 6) *Appeal: Directing judgment below: Amendment of pleading.*

1. In sec. 1210*d*, Stats. (Supp. 1906; Laws of 1901, ch. 9)—providing that in all cases where the invalidity of a special assessment for improvements in any city is caused by reason of the work hav-

ing been done "without authority of law *or* by the failure of the common council to pass a valid ordinance adopting" any part or parts of ch. 40*a*, Stats. (1898), no new assessment shall be made until after the due passage of an ordinance adopting the essential provisions of said chapter relating to city improvements,—the word *or* should be construed as if it were *and;* and the adoption of any part of ch. 40*a* is prerequisite to a reassessment only when the original lack of authority was by reason of a failure to adopt such provisions.

2. So construed the section is applicable to all cities in the state, including Milwaukee.
3. The substitution (by ch. 354, Laws of 1903) of a remedy by reassessment in place of an action for damages for the grading of a street where such grading is illegal merely because the previous assessment of benefits and damages was invalid, was within the power of the legislature. No vested right was thereby taken away, since there is no constitutional or common-law right to recover damages for the authorized grading of a street by a city when there is no negligence in the act; and it was competent for the legislature to provide that a valid assessment should no longer be a condition precedent to the legality of the grading.
4. Where a substantial part of an adjoining owner's land falls into the street by reason of the removal of its lateral support in the course of grading there is a taking of the soil for public purposes, for which the owner is entitled to recover at least nominal damages. An assessment, in the grading proceedings, of the benefits and damages accruing from the work does not cover such a taking.
5. On reversing the judgment of the trial court, if it appear that the case was fully tried and that there is no possibility of a material change, upon a new trial, in the facts proven, the supreme court will direct the entry of judgment.
6. When a case is ready for final disposition after full trial, the supreme court will not remit it with leave to make application to the trial court to set up a new cause of action or new defense, unless there is, at least, a fairly persuasive showing on the merits and it is also made to appear that the failure to present the new cause of action or defense in the first instance was not due to mere negligence.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

For the appellant there was a brief by *John T. Kelly,* city

attorney, and *Clinton G. Price,* assistant city attorney, of counsel, and oral argument by *Mr. Price.*

For the respondents there was a brief by *C. H. Hamilton* and *Howard Van Wyck,* and oral argument by *Mr. Van Wyck.*

The following opinion was filed January 29, 1907:

WINSLOW, J. This is an action at law commenced in October, 1903, to recover damages for the cutting down of a street adjoining plaintiffs' land in the city of *Milwaukee* in the year 1903 on the ground that the assessment of benefits and damages was void. After its commencement and before trial the plaintiffs commenced an action in equity against the city and the contractor to restrain the collection of the assessment of benefits and cancel the certificate, in which latter action an interlocutory judgment ordering a reassessment was rendered, a reassessment was had which was held valid, and final judgment was rendered thereon, from which judgment no appeal has been taken. After the rendition of judgment in the equitable action the present action was brought to trial and a special verdict was rendered finding (1) that plaintiffs' land was depreciated in value by the grading; (2) that the difference in its value immediately before and immediately after the grading without considering any benefits resulting therefrom was $3,975; (3) that there was no depreciation resulting from subsidence of the soil. Judgment was rendered on this verdict for the plaintiffs for the damages found by the jury, and the defendant appeals.

The defendant moved at the conclusion of the evidence that a verdict in its favor be directed, and excepted to the overruling of the motion, and this exception fairly raises the question suggested in the case of *Pabst B. Co. v. Milwaukee,* 126 Wis. 110, 105 N. W. 563, namely, the question of the effect of the reassessment statutes upon an action for damages for the grading of a street when the grading is claimed to have

been illegal by reason of a defective assessment of benefits and damages.

To properly answer this question a brief consideration of the principles upon which such actions as the present have been sustained, prior to the passage of the reassessment laws, will be helpful. The mere changing of the actual surface of a street by a municipal corporation is not a taking of the private property of an adjoining owner for public use, and hence not within the constitutional provision requiring compensation to be made. *Harrison v. Milwaukee Co.* 51 Wis. 645, 8 N. W. 731. If such change be made under authority of law and with reasonable skill and care, there is no liability for damages in the absence of an express statute giving damages. *Dore v. Milwaukee,* 42 Wis. 108; *Harrison v. Milwaukee Co., supra; Colclough v. Milwaukee,* 92 Wis. 182, 65 N. W. 1039. If, however, the law authorizes such change only in a certain manner and after the taking of certain definite prescribed steps such as the previous assessment of benefits and damages, the rule has been that the failure to take any substantial prescribed step would render the city liable in an action at law for damages thereby resulting to the adjoining lots. *Crossett v. Janesville,* 28 Wis. 420; *Dore v. Milwaukee, supra; Meinzer v. Racine,* 68 Wis. 241, 32 N. W. 139; *Colclough v. Milwaukee, supra; Drummond v. Eau Claire,* 85 Wis. 556, 55 N. W. 1028. The effect of these rulings was that in such a case as the present full damages could be recovered in the action at law, and the assessment of benefits could be set aside in equity. In this situation, and evidently with the view of obviating some, at least, of the obvious injustice resulting from these principles, the legislature passed ch. 262, Laws of 1897 (subsequently incorporated with some changes in the Statutes of 1898 as secs. 1210*d,* 1210*e,* and 1210*f*).

The first of these sections provided, in substance, that where certain specified street improvements (including grad-

ing) may be made in any city and the special assessment made therefor is invalid either (1) for failure to make a proper assessment of benefits and damages, or (2) failure to observe any provision of law, or (3) because of any act or defect in the proceeding on which the assessment is based, or (4) because of any unauthorized provision in the contract tending to increase the contract price of the work, the city authorities shall proceed to make a new assessment. The section further provided for an appeal by the property owner, for the issuance of a new certificate in place of the invalid certificate, and for the payment to the certificate holder of the excess of the invalid certificate over the new certificate out of the proper fund. This section was held constitutional and applied to the city of *Milwaukee* in the case of *Sanderson v. Herman,* 108 Wis. 662, 84 N. W. 890, 85 N. W. 141. By ch. 9, Laws of 1901, this section was amended so as to provide for a reassessment where the original assessment is invalid (1) because the work has been done without authority of law, or (2) for failure to make a proper assessment of benefits and damages, or (3) for failure to observe any provision of law either in adopting any part of ch. 40*a* of the Statutes of 1898 or otherwise, or (4) because of any act or defect in the proceedings on which the assessment is based, or (5) because of the insertion of any unauthorized provision in the contract for doing the work. This chapter contained other detail amendments not important to the present discussion, and closed with a new provision to the effect that, when the special assessment is invalid by reason of the work having been done "without authority of law or by the failure of the common council to pass a valid ordinance adopting any part or parts of said ch. 40*a*," no new assessment shall be made until after the due passage of an ordinance adopting the essential provisions of said chapter relating to city improvements, after which the new assessment shall be as effectual as if made before the doing of the work. By ch. 19, Laws of 1901, it was further pro-

vided that no new assessment should be made after the expiration of three years from the time the original assessment was set aside. The section as thus amended was held valid in a case where the defect consisted of a failure to adopt all the essential provisions of ch. 40*a*, in the case of *Schintgen v. La Crosse*, 117 Wis. 158, 94 N. W. 84. By ch. 276, Laws of 1903, the section was again amended by making it applicable to a case where the assessment is invalid because the contract for the work is made with a foreign corporation which has not complied with the provisions of sec. 1770*b*, Stats. (1898). Some further detail amendments were made by this act which are not material here. It is proper to note, however, that in rewriting that part of the section providing that the excess in amount of the *invalid* assessment certificate over the new certificate, if any, should be paid out of the proper fund, the word *valid* was erroneously inserted in place of the word *invalid*. The error is so palpable as hardly to justify notice. The word *valid* must be read *invalid*, otherwise the provision becomes worse than meaningless.

It is claimed, however, that the section as it now stands does not apply to the present case or to any case except one where before the reassessment the city has adopted that part of the general city charter law—ch. 40*a*, Stats. (1898)—relating to city improvements. This claim is based upon the provision first appearing in ch. 9, Laws of 1901, to the effect that "in all cases" where the invalidity of the assessment is caused by reason of the work having been done "without authority of law, or by failure of the common council" to pass a valid ordinance adopting any part or parts of the general city charter law, no new assessments shall be made until the provisions of the general charter law relating to city improvements have been duly adopted. The proposition seems to be seriously urged, but we cannot consider it sound. This clause was put into the law at the same time that the fact of failure to adopt a part of the general charter was added to the law as

an additional defect which might be cured by reassessment; the two clauses went together, evidently with the idea that where an attempt had been made to make an assessment according to the provisions of the general charter under the mistaken idea that the city had adopted such provisions, there could not be an effective reassessment until the city, by adopting the provisions of the general charter, had clothed itself with power to make an original assessment. If the original assessment was void because of lack of power, any reassessment made before the power was acquired must be void for the same reason.. This view of the legislative idea is further reinforced by the fact that in the very opening sentence of the section it is made applicable to "any city," just as it was when originally passed in 1897. Again, the act covers a number of defects not connected in any way with a failure to properly adopt the city improvement provisions of the general charter. Is it reasonable to suppose that, where the assessment is void because of a provision in the contract not authorized by law which increased the cost, the legislature intended to compel a city which has ample provisions for such assessments in its special charter to adopt the general charter before it could reassess? Clearly the remedy in such case would have no relevancy to the defect to be cured. Really the only ground upon which the claim is based is the fact that the clause in question provides that, where the assessment is void because the work was done *"without authority of law or"* by failure to adopt the provisions of the general charter, such provisions must be adopted before a reassessment is made. The words "without authority of law" are said to cover every defect, and hence the clause covers every case. The manifest incongruity, if not absurdity, of such a meaning, however, justifies resort to rules of construction. No absurd intent should be attributed to the legislature if it can be avoided. The rule is familiar that the word "or" may be construed as if it were "and" under such circumstances. We think the

rule should be applied here, and, when it is applied and the whole act is read together, and the evils intended to be obviated are considered, we entertain no doubt that the words "without authority of law" in this provision refer simply to a lack of authority by reason of failure to adopt the provisions of the general charter, and that only in such cases is it necessary that such provisions should be adopted before the reassessment.

Secs. 1210*c* and 1210*f*, Stats. (1898), are really supplementary sections added to sec. 1210*d* for the purpose of rounding out the reassessment system, and providing for its application after an action has been brought to set aside the assessment. Sec. 1210*e* provides that in such case, if the court determines that the assessment is invalid by reason of a defective assessment of benefits and damages, the proceedings shall be stayed and a reassessment ordered and made, which the plaintiff may contest until a valid reassessment has been made, when the plaintiff is required to pay into court as a condition of relief the amount of benefits which he should justly pay. Sec. 1210*f* provides that in any action to set aside an assessment on other grounds than those affecting the validity of the assessment of benefits and damages, if the assessment be held void the court shall determine the amount which the plaintiff justly should pay as a condition of relief. There have been amendments to these sections by ch. 354, Laws of 1903, and ch. 294, Laws of 1905, and a new section entitled 1210*ee* has been added by the last-named act. None of the changes made are material upon the present question except the change in sec. 1210*e*, which provides that, in an action at law to recover damages arising from failure to make a proper assessment or from failure to observe any provision of law, a reassessment of damages and benefits shall be made as well as in an action in equity to set aside the assessment and with like effect on the action. This amendment was made by ch. 354, Laws of 1903, published May 25, 1903. Here was mani-

fested very clearly the legislative intent to reverse the rule that damages for the grading may be recovered at law solely because the original assessment of benefits and damages is shown to have been invalid, and to substitute for such legal action the remedy by reassessment after the work is done. Has the legislature power so to provide? It is said that it has not, because the act of grading was illegal when done, and the right to recover damages therefor became a vested right which the legislature could not take away. The argument seems strong, but is in our judgment fallacious. When the defect in the proceedings is simply a failure to make a valid assessment, the illegality of the act of grading arises simply from the fact that the law has made a valid assessment a condition precedent to the grading. The legislature could with equal legality have provided in the first instance that the grading should be done first and the assessments of benefits and damages made afterwards. This results because, as we have seen, there is no constitutional or common-law right to recover damages for the authorized grading of a street by a municipal corporation when there is no negligence in the act. Suppose that a city charter provided that the assessment of benefits and damages might be made either before the work was done or afterwards, at the will of the council, could it be claimed that such provisions were invalid or that, because the assessment was not made before the grading was done, a liability for damages was incurred? We think not. This is practically the situation under the reassessment statutes which now exist and existed at the time the proceedings for the grading in question were commenced. The legislature now says to the city, you may grade the street, making an assessment of the benefits and damages first, but, if such assessment is not properly made, you may make a proper one after the work is done with the same effect. By these provisions it seems to us certain that it has effectually removed a valid assessment as a condition prece-

dent to the legality of the grading. It has provided that there must be a valid assessment at some time during the proceedings, but whether before or after the grading is done is immaterial, and so the act of grading, though done before the valid assessment is made, loses its illegal character and does not in fact become illegal until the time has elapsed within which a valid assessment can be made.

This question was not raised or considered in the cases of *Jorgenson v. Superior,* 111 Wis. 561, 87 N. W. 565, and *Friedrich v. Milwaukee,* 114 Wis. 304, 90 N. W. 174, where actions for consequential damages were sustained on account of defects in the assessment of benefits and damages, and these cases, so far as they conflict with the results now reached, must be considered as overruled. There are other cases where the principle that damages may be recovered at law where the assessment was illegal has been referred to approvingly, such as *Haubner v. Milwaukee,* 124 Wis. 153, 101 N. W. 930, 102 N. W. 578, but such references are now disapproved.

It follows that the defendant's motion for a directed verdict should have been granted.

It appearing that the case was fully tried and that there is no possibility of a material change in the facts proven upon a new trial, judgment for the defendant will be ordered.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the defendant dismissing the complaint.

Upon a motion for a rehearing there was a brief for the respondents by *C. H. Hamilton,* and a brief for the appellant signed by *John T. Kelly,* city attorney, and *Clinton G. Price,* of counsel.

The following opinion was filed April 30, 1907:

WINSLOW, J. The respondent moves for a rehearing in this case upon three grounds which will be briefly considered.

1. It is forcibly argued that the court was wrong in holding that sec. 1210*d*, Stats. (1898), as amended by ch. 9, Laws of 1901, applies to the city of *Milwaukee*. We have again examined the question in the light of the new considerations now urged, and we feel entirely satisfied with the correctness of the original decision upon this point; hence the question will not be reopened.

2. It is urged that it appears by the defendant's answer that the grade of the street was not fixed by ordinance until November 20, 1902, which was after the actual grading had been ordered to be done, and hence that there was neither jurisdiction on the part of the city council to order the grading to be done nor jurisdiction on the part of the court to order a reassessment. This subject was briefly mentioned in the original brief of respondents, but was overlooked in the opinion. Reference to the pleadings shows that in the complaint it was expressly charged that the city fixed the grade of the street by ordinances adopted during the years 1901, 1902, and 1903, and that the resolution by which the proceedings for actually grading the streets were initiated was introduced into the common council March 10, 1902, and adopted May 5, 1902. There was no charge in the complaint that the proceedings were irregular or illegal on account of any failure to previously fix the grade, but the sole claim made was that the assessment was void because arbitrarily made and because there was a total failure to consider or assess any damages. There was an allegation in the answer that the first grade of the street was fixed November 20, 1902, which would be after the proceedings for grading had been commenced; but it was further alleged in the same connection that whatever grading was done in front of the plaintiffs' premises was done for the purpose of conforming the street to said established grade. Upon the argument of the case it was claimed that this date was a clerical error and should have been November 20, 1900. However this may be, it

clearly appears that no claim of illegality or irregularity in the grading proceedings on account of failure to properly establish the grade was ever made in this case until it reached this court. The case was fought through the trial court upon the assumption that the grade was established by timely action of the common council, as the complaint in effect states. No attention was paid to the allegation in the answer that the grade was first established in November, 1902, or, if attention was paid thereto, it seems to have been considered immaterial.

It is now stated by respondents' counsel that since the prior argument sufficient facts have come to his notice to warrant him in asserting that no *valid* ordinance establishing the grade of the street has ever been passed by the common council, and he desires leave to amend his complaint so as to allege this fact and obtain a new trial on this new issue. It will be noticed that he does not claim that no ordinance was attempted to be passed or that the date of November 20, 1902, is the correct date, but simply that no valid ordinance was ever passed. It is only in exceptional cases that this court will remit a case which is ready for final disposition after full trial, and grant leave to make application to the trial court to set up new causes of action or new defenses making substantially another case. There must be a fairly persuasive showing on the merits, and it should also appear that the failure to present the new cause of action or defense is not attributable to mere negligence. *Wis. M. & F. Ins. Co. Bank v. Mann,* 100 Wis. 596, 76 N. W. 777. We do not think such a case is here presented.

3. It was an undisputed fact in the case that by reason of the grading of the street the soil of plaintiffs' premises was left unsupported on the margin of the street, and that considerable quantities of the soil fell down into the street; and the jury found in answer to the third question that the

subsidence of the soil caused no depreciation in the value of the premises. It is now claimed by the respondents that this subsidence of the soil constitutes a taking of property, and that the plaintiffs are in any event entitled to a judgment for nominal damages and costs, irrespective of all other questions. *Damkoehler v. Milwaukee,* 124 Wis. 144, 101 N. W. 706. This court has consistently and frequently held that, in the absence of express statute, a city is not liable for consequential damages to an adjoining property owner resulting from the lawful change of grade of a street, unless the work be negligently done and injury result from such negligence. *Harrison v. Milwaukee Co.* 51 Wis. 645, 8 N. W. 731; *Smith v. Eau Claire,* 78 Wis. 547, 47 N. W. 830; *Colclough v. Milwaukee,* 92 Wis. 182, 65 N. W. 1039. This is because the mere changing of the grade of the street is not considered a taking of property within the meaning of the constitution. An instance of recovery on the ground of negligence in doing the work will be found in *Bunker v. Hudson,* 122 Wis. 43, 99 N. W. 448, where in grading up a street the dirt was allowed to extend over onto an adjoining proprietor's land.

There is a sharp conflict in the authorities upon the question whether a property owner is entitled as against the city to the lateral support of the soil. There is much authority in support of the proposition that no such right exists, and Mr. Dillon in his work on Municipal Corporations (4th ed. §§ 990, 991) so states the rule. There is also much authority to the contrary. 2 Abbott, Mun. Corp. § 819; Elliott, Roads & Streets (2d ed.) § 205. This court upon full consideration of the subject in the *Damkoehler Case* adopted the latter doctrine as the one best calculated to do justice, on the ground that, where a substantial part of the adjoining owner's land falls into the street by reason of the removal of its lateral support in the course of grading, there was a

taking of the soil for public purposes and not a mere consequential damage. To the authorities in support of this rule cited in that case may be added *Parke v. Seattle,* 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68. We shall not rediscuss the question here. It must be considered as settled.

Such being the law, it appears clearly that there has been a taking of private property here for public use, for which the plaintiffs are entitled to recover nominal damages. The assessment of benefits and damages does not cover such taking, for the plain reason that such assessment is only designed for the purpose of measuring the benefits and damages resulting from a lawful exercise of the power to grade, not for assessing the value of property taken for public use. Although there was no actual damage resulting from the taking, the plaintiffs were entitled to recover nominal damages for the invasion of their constitutional rights, and this would carry costs. The judgment for costs in favor of the plaintiffs should therefore have been allowed to stand.

By the Court.—The motion for a rehearing is denied without costs, and the mandate herein is changed so as to read as follows: The judgment is modified by reducing the amount thereof to the sum of $124.31, and as so modified the same is affirmed, with costs in this court to the appellant.

PINKERTON, Respondent, vs. FENELON, Appellant.

January 29—April 30, 1907.

Deeds: Execution by person in official capacity: Title conveyed: Tax titles: Quitclaim by county.

1. A quitclaim deed executed by one in an official or representative character is to be given no greater effect than is warranted by the authority conferred upon him.

2. Thus, a quitclaim deed signed in the name of a county by the county clerk pursuant to authority given him by the county board, under sec. 1193, Stats. (1898), to convey certain lands which had been tax-deeded to the county, is *held* to convey only the title and interest which had arisen under tax deeds taken out by the county upon certificates held at the time of the negotiation with the grantee, but no equitable title or interest which the county may have had prior to the tax sales in question.

APPEAL from a judgment of the circuit court for Price county: A. J. VINJE, Judge. *Affirmed.*

Action of ejectment to recover 160 acres of land in section 4, township 37, range 1 west, in Price county. The titles claimed by the respective parties were the same as those considered in *Cole v. Van Ostrand, post,* p. 454, 110 N. W. 884, the parties here being reversed, the plaintiff claiming the same titles as did Van Ostrand and the defendant the same titles as did Janet Macdonald Cole in that case. An additional issue, however, was presented by the pleadings in this case arising as follows: The defendant, by counterclaim, alleged that the transfer of tax certificates in 1895 from Price county to Winchester was void by reason of the failure to give notice of the intention to sell for less than the face, as required by sec. 664, Stats. (1898); that thereby plaintiff's grantor, in taking tax deeds, if he thus acquired legal title, became charged with a constructive trust to hold the same in favor of Price county; and that by the quitclaim deed executed in 1899 from Price county to the J. L. Gates Land Company, defendant's grantor, the equitable title so arising in Price county was transferred to that company, and from it to the defendant. Upon those grounds she prayed judgment, among other things, establishing such trust and decreeing the title to be in her as against the plaintiff. The court refused to admit evidence in support of these allegations and held defendant's title under her later tax deeds void on the same grounds as was the plaintiff's in *Cole v. Van Ostrand, post,* p. 454, 110 N. W. 884, and rendered judgment in the plaint-

iff's favor, after he had paid into court the amount of taxes, interest, and expenses incurred by defendant in connection with her tax titles. From such judgment the defendant appeals.

Rublee A. Cole, for the appellant.

Asa K. Owen, for the respondent.

The following opinion was filed March 19, 1907:

DODGE, J. With one exception, all the claims of the respective parties in this case have been considered and decided in the two cases argued herewith, but decided February 19, 1907, of *Cole v. Van Ostrand, post,* p. 454, and *Van Ostrand v. Cole, post,* p. 446. The distinguishing consideration in this case rests upon the claim made in the pleadings and offered to be established by the proof, that the sale of the tax certificates by Price county to Winchester, upon which were taken the tax deeds under which plaintiff claims, was void in law because the act of the county officers was unlawful in the absence of published notice; that such illegality was participated in by, and, at least constructively, known to, Winchester; and that, as a result, when he or his assignee, Price County Land & Improvement Company, acquired a formal legal title by a tax deed, the law at once, by implication, imposed thereon a constructive trust in favor of the county, which had remained the real owner of the certificates; whence arose at least an equitable, if not a complete legal, title to the land in the county. It is claimed further that the quitclaim deed from the county of all its right, title, and interest in the lands conveyed this title to defendant's grantor, and that she therefore is entitled to a decree of a court of equity declaring the title in her and removing the cloud thereon resulting from the recorded tax deeds to plaintiff's grantors. The argument is persuasive, but we shall not feel called upon to decide upon the soundness of its logic in any respect save one, namely, whether the quitclaim deed in the name of Price county to

the J. L. Gates Land Company served to convey such equitable title arising under the tax deeds to the Price County Land & Improvement Company, if any such equitable title was held by the county. Very probably a general quitclaim deed from an individual *sui juris* would, presumptively, and in the absence of any legitimate evidence to qualify it, be deemed to convey every shred of interest in the described land which he had. But a very different rule applies to quitclaim deeds executed by one in an official or representative character, for such deeds are not the deeds of the ostensible grantor any further than the person signing them was authorized to act on behalf of his principal. The very fact that the signers are dealing, not with their own property, but with that of some one else, which is apparent upon the face of the instrument, carries with it the implication and notice that the instrument is intended to have no greater effect than is warranted by the authority conferred upon those executing it. *Towle v. Ewing,* 23 Wis. 336; *Southwick v. Atlantic F. & M. Ins. Co.* 133 Mass. 457; *Dickerson v. Campbell,* 32 Mo. 544, 548; *Price v. King,* 44 Kan. 639, 25 Pac. 43; *Wright v. De Groff,* 14 Mich. 164; *Shurtz v. Thomas,* 8 Pa. St. 359; 9 Am. & Eng. Ency. of Law (2d ed.) 107.

In the present case the so-called deed is signed "Price County, by W. H. Lippels, County Clerk," a document of no legal validity whatever against anybody except so far as the county clerk was authorized to act for the county in making a quitclaim of its lands or some interest therein. No law gives the county clerk any such power or authority, save as it may be delegated to him by the county board. The extent to which the county board has power, generally, to sell or convey away real estate belonging to the county, or to delegate authority to any officer to execute instruments in pursuance of such power, must rest on secs. 652, 653, Stats. (1898). But this authority to deal generally with property of the county, real and personal, is differentiated by the statutes

themselves from the disposal of tax-deeded lands by sec. 1193, Stats. (1898); such differentiation being doubtless in recognition of the fact that even the taking of tax deeds by counties is not for the ultimate purpose of acquiring the land, but of enforcing tax burdens against it. *Iron River v. Bayfield Co.* 106 Wis. 587, 593, 82 N. W. 559. That section also confines the power of the county clerk to exercise the corporate power of the county to convey to cases authorized by the county board. Since, therefore, the signature of the county clerk to a deed in the name of the county is meaningless and forceless unless placed there in pursuance of express authority from the county board, it necessarily refers the grantee and all claiming under him back to the action of the county board. It has been held that such deed is not even evidence of title without proof of the county board's action. *Woodman v. Clapp,* 21 Wis. 355; *Bemis v. Weege,* 67 Wis. 435, 30 N. W. 938; *Semple v. Whorton,* 68 Wis. 626, 633, 32 N. W. 690.

From these considerations it is, of course, obvious that, however broad the terms of a deed signed by the county clerk, its construction and effect are limited to the purpose for which he was authorized to execute any deed at all, and the records of the county board on which it must rest for its validity become and are a limitation of the instrument. This, of course, necessitates an examination of the action of the county board which authorized this deed. When we turn to that, we find the whole transaction confined to the offer of a price for lands which had been tax-deeded to the county, an acceptance thereof, and a resolution authorizing the clerk merely to execute a deed of such tax-deeded lands. The transactions all proceeded under and pursuant to sec. 1193. The subject of purchase by the J. L. Gates Land Company and of the sale by the county was the tax title which they might acquire by tax deeds under certificates then held by the latter, in pursuance of which negotiation the two tax deeds declared on by

the defendant were taken out in the name of the county. It is made entirely clear by this record that there was no intent on the part of the county board to convey any other interests than such as had arisen under the tax deeds taken out by the county upon certificates held at the time of the negotiation, and such instrument, therefore, however ample its terms, could convey no other or different title which the county might have in such lands, any more than as if by some accident the county poor farm, or the county courthouse itself, had been assessed, sold for taxes, and covered by one of these tax deeds to the county, followed by a quitclaim deed under circumstances such as these. We apprehend no one would contend that such deed could be construed as adding to the invalid tax title the county's fee title to such county property. We must therefore conclude that, whatever equitable title the county may have had to these lands as between it and the Price County Land & Improvement Company or its grantee, the plaintiff, prior to the tax sales and tax deeds on which defendant's title rests, no such equitable interest or title was conveyed to the J. L. Gates Land Company by the quitclaim deed from the county, and hence that it is not vested in the defendant.

The invalidity of defendant's title as against plaintiff, but for this equitable claim, is established upon the grounds stated in the two accompanying cases above mentioned, and, since we now reach the conclusion that she has no such equitable title, the judgment in favor of plaintiff must stand.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied April 30, 1907.

VAN OSTRAND, Respondent, vs. COLE, Appellant.

January 29—April 30, 1907.

Tax titles: Limitations: Ejectment by grantee in tax deed: Failure to pay taxes: Estoppel: Tender of taxes, etc., before suit brought: Costs: Deeds to county: Defects: Description of lands in delinquent return: Presumption as to newspaper publishing notice of sale.

1. Under secs. 1187, 1188, Stats. (1898), when the lands covered by a tax deed fair on its face have remained vacant and unoccupied at all times during the three years next succeeding the recording of the deed, the title of the grantee is not subject to attack for defects in the tax proceedings; and he may maintain ejectment against any person thereafter taking possession adversely to such deed.
2. Failure to pay taxes does not of itself estop the owner of land to claim his rights as such owner.
3. Ejectment may be maintained against a tax-title claimant, although there was no previous tender to him of the sums paid for taxes, interest, etc., which, under sec. 3087, Stats. (1898), he is to be reimbursed in case his title fails on account of defects in the tax proceedings; and failure to make such a tender does not affect the plaintiff's right to recover costs in the action from the defendant.
4. Secs. 1191, 1191*a*, Stats. (1898), do not cure defects in tax proceedings and tax deeds based thereon or preclude any person from showing title and right of possession or from attacking any claim to land under tax deeds taken by the county for any defect or insufficiency rendering the deeds invalid.
5. Although in a town treasurer's return of delinquent taxes the township, range, and section numbers which appeared at the top of the respective columns were not repeated or indicated by ditto marks after the description of each parcel of land, the descriptions are *held* sufficiently definite and to meet the requirements of sec. 1047, Stats. (1898).
6. In the absence of proof to the contrary it will be presumed that the newspaper in which the notice of a tax sale was published was one meeting the requirement of sec. 1130, Stats. (1898), that it should have "been regularly and continuously published in such county once in each calendar week for at least two years immediately before the date of such notice."

APPEAL from a judgment of the circuit court for Price county: A. J. VINJE, Judge. *Affirmed.*

An action in ejectment, under the statute, to recover the possession of 160 acres of vacant and unoccupied land. Plaintiff alleged ownership in fee and right of possession and that defendant unlawfully withheld possession, and demanded judgment declaring the title and right of possession to be in him. Damages were also demanded. Defendant answered claiming ownership in fee, that she had acquired title through deeds from Price county to the J. L. Gates Land Company, and from that company to her. The various deeds were described in detail, as were certain tax certificates alleged to have been assigned to defendant and issued subsequent to the dates of the certificates upon which the tax deeds were based. These deeds were as follows:

Tax deed dated March 29, 1899, recorded March 30, 1899, on tax certificate of May 21, 1895, for the taxes of 1894.

Tax deed dated June 22, 1899, recorded June 23, 1899, on tax certificate of May 19, 1896, for the taxes of 1895.

(These two deeds were issued to Price county. On October 17, 1899, quitclaim deeds from Price county to the J. L. Gates Land Company and from the J. L. Gates Land Company to the defendant were recorded.)

Tax deed to the defendant, dated August 29, 1901, recorded August 29, 1901, on tax certificate of May 18, 1897, for the taxes of 1896.

Tax deed to the defendant, dated August 30, 1901, recorded August 30, 1901, on tax certificate of May 17, 1898, for the taxes of 1897.

The taxes levied against these lands for the years 1894, 1895, 1896, 1897, 1898, and 1899 were not paid. The lands were sold to the county for the delinquent taxes of these years, and the defendant acquired title through the quitclaim deeds above described to the interest of the county in the lands and the tax certificates which the county held at the time. The

tax certificates for the year 1899 do not appear to have been disposed of by the county. Defendant has paid the taxes levied on the lands since 1899. Defendant alleged that Price county became the owner of all tax certificates issued on these lands after the issuance of the first tax-sale certificate above described, and that under sec. 1191, Stats. (1898), the county in the year 1899 became the owner in fee of these lands, and that the lands were then and until conveyed by the county exempt from taxation. Defendant pleaded sec. 1191*a*, Stats. (1898), and alleged under it that five successive purchases by the county for taxes, if unredeemed, gave the county a title in fee. Sec. 1187, Stats. (1898), was pleaded, it being averred that in cases where vacant and unoccupied lands have been sold for delinquent taxes a party, in order to perfect his title under such tax deed, must bring an action to recover possession of the lands within three years from the recording of his tax deed. Defendant also pleaded secs. 1210*h*, 1188, and 1189*a*, Stats. (1898), as barring the action. Defendant therefore demanded judgment that she was the owner in fee of the lands and that plaintiff's claim thereto was barred, and for costs.

Plaintiff in his reply to the counterclaim of the defendant pleaded that the town treasurers failed to make valid return of these lands as delinquent for the years 1894, 1895, 1896, and 1897, in that the return, contrary to the statute, added the five per centum penalty to the delinquent taxes; that there was a failure to return the delinquent personal taxes with the delinquent taxes on lands; that these returns were defective because the town treasurers had not subscribed at the foot of the return according to the form of the statute (it appears the verification properly subscribed preceded the list); and that the descriptions of the separate parcels were indefinite and incomplete, in that the section, township, or range descriptions were not repeated or indicated by ditto marks for each parcel. The proceedings subsequent to the return were

alleged to be defective, in that the proof of publication of the notice of sale was not filed with the county treasurer; that such proof of publication was not transmitted to the county treasurer within six days after the last publication, as prescribed by sec. 1132, Stats. (1898); that the proof did not show that the notice of sale was published "once in each week for four successive weeks" prior to the date of sale; that the proof failed to show that the paper in which the notices were published had been published regularly and continuously once in each calendar week for two years prior to the publication of the notices, as required by sec. 1130, Stats. (1898); and that the sale was fatally defective, because, under these conditions, it wrongfully included a printer's fee as part of the charges for the delinquent tax sales. Plaintiff in his reply offered to pay any sum due defendant for taxes, interest, and charges paid by defendant in obtaining her tax deeds and subsequently.

Plaintiff on the trial showed, by records, title in himself by various deeds as follows:

Tax deed to Geo. B. Burrows, dated and recorded May 16, 1891, on tax-sale certificate of 1888.

Tax deed to Geo. B. Burrows, dated and recorded May 24, 1892, on tax-sale certificate of 1889.

Tax deed to Geo. B. Burrows, dated and recorded June 1, 1893, on tax-sale certificate of 1890.

Tax deed to Geo. B. Burrows, dated and recorded June 2, 1894, on tax-sale certificate of 1891.

Tax deed to Geo. B. Burrows, dated and recorded May 24, 1890, on tax-sale certificate of 1887.

Quitclaim deed from Geo. B. Burrows to Thomas H. Patterson, dated and recorded May 4, 1897.

Quitclaim deed from Thomas H. Patterson and wife to plaintiff, dated September 27, 1901, recorded September 28, 1901.

The court refused to allow defendant to introduce evidence

of irregularities in the proceedings on which the tax deeds on which plaintiff's title is founded were based. The judgment awarded allowed defendant the sum paid by her for taxes and whatever she had paid in procuring her tax deeds. Plaintiff was allowed his costs. This is an appeal from the judgment.

Rublee A. Cole, for the appellant.

For the respondent there was a brief by *Barry & Barry,* and oral argument by *M. Barry.*

The following opinion was filed February 19, 1907:

SIEBECKER, J. Much stress is placed in argument on the claim that plaintiff has failed to show title to the premises. As appears from the foregoing statement of the facts, plaintiff's claim of title is founded on the five tax deeds issued by Price county to Burrows, all of which were duly of record for more than three years before the commencement of this action. It is contended that plaintiff's title under these deeds is not protected from attack by defendant for defects and insufficiencies in the tax proceedings. The lands involved were vacant and unoccupied at all the times covered by these transactions. Under these circumstances it follows that the grantee and those holding under him were constructively in possession of the premises from the time of the recording of the tax deeds. The title so acquired became absolute, by force of secs. 1187, 1188, Stats. (1898), at the expiration of three years from the date of the recording of the tax deed fair on its face, and was not thereafter subject to attack for defects in the proceedings. *Cezikolski v. Frydrychowicz,* 120 Wis. 369, 98 N. W. 211; *Wis. River L. Co. v. Paine L. Co.* 130 Wis. 393, 110 N. W. 220, and cases therein cited. In the last case the court adopts the individual view on this question of Chief Justice DIXON as expressed in *Lawrence v. Kenney,* 32 Wis. 281, holding that at the expiration of the prescribed period such a grantee and those

holding under him acquire an absolute title and right of possession, and that they "may maintain ejectment against any person thereafter taking possession adversely to such deed." In view of this and other decisions on the subject, the right of the plaintiff to maintain this action on the tax deeds issued to Burrows cannot be questioned.

Appellant's counsel cites us to *Dickerson v. Colgrove,* 100 U. S. 578, in support of the claim that plaintiff's grantor, Patterson, was estopped from claiming title by reason of his failure to pay taxes subsequent to the issuance of the tax deeds forming the basis of his title. An examination of the case fails to disclose any materiality to or bearing on the situation involved here, and it is not suggested how the failure to pay taxes is in itself an estoppel against the owner from claiming his rights as such owner, unless, for failure to pay taxes, his interests have been cut off by the sale and transfer.

It is further contended that plaintiff could not maintain this action unless before action he tendered defendant the full amount of all taxes, interest, and charges arising out of the sale of the premises for the nonpayment of taxes involved in the proceedings on which her tax titles are based. The argument that the failure to so tender payment of these sums would be a deprivation of defendant's right to the sums so paid for taxes, interest, and charges on account of the owner's delinquency, and would thus deprive her of the interest acquired in the lands by such payments, is without merit, in view of the provision of the statute providing that such purchasers shall be reimbursed the sums paid for tax certificates held by them, if the title fails on account of defects or deficiencies in the tax proceeding. Sec. 3087, Stats. (1898), makes provision for the repayment of the amounts paid for taxes, interest, and charges by holders of certificates on the land of such delinquent owner in case he establishes the right to hold the premises against the claims of such purchasers of tax certificates. It is averred that

under the circumstances the court was not justified in compelling defendant to pay the costs of the action. We find nothing in the case which should relieve defendant from this obligation to the plaintiff as the successful party in an action in ejectment. In such actions the right to costs is governed by the rules applied to actions at law.

Counsel places reliance on the claim that Price county obtained an absolute fee in the lands under tax deeds taken by it in March and June, 1899, which title defendant acquired subsequently by conveyance from the J. L. Gates Land Company, the grantee of the county. It is claimed that under secs. 1191, 1191*a*, Stats. (1898), this title became absolute when these tax deeds issued, because the county then held unredeemed tax-sale certificates on the same property "for two successive years subsequent to the date of the sale on which the deed" issued, and that the land was therefore exempt from taxation until sold by the county. It appears that the county sold and conveyed the lands in July following to the J. L. Gates Land Company. This rendered them subject to taxation from that time. This statute in no way cures defects in the tax proceedings and the deed based thereon, and precludes no person from showing title and right of possession, and from assailing any claim to the premises under the tax deeds taken by the county for any defect or insufficiency rendering the deeds invalid. Under the facts and circumstances before us we find plaintiff's claim that these statutes in no respect strengthen defendant's title or impair that of plaintiff fully sustained.

Secs. 1189 and 1210*h* have no application to the issues of this case and therefore need not be considered.

Proceeding to an examination of the tax proceedings under which defendant claims title, we find that the treasurer omitted to subscribe his name to the delinquent return, but subscribed the affidavit attached thereto, and also an omission to carry out after each description in separate lines the township, range, and at times the section number, all of which

appeared at the top of the respective columns. The return also contains a separate column, headed "Five per centum collection fees," giving the amount of such charge in addition to the total amount of the unpaid tax returned. The plaintiff also claims that the proceedings subsequent to the delinquent return are defective and insufficient, in that the affidavits of the proof of publication fail to show that the notices were published "once in each week for four successive weeks;" that the newspaper in which the notices were published was published continuously once in each calendar week for two years immediately before the date of such notices; that the affidavits of publication were not transmitted to the county treasurer within six days after the last legal publication, pursuant to sec. 1132, Stats. (1898); and that an unauthorized printer's fee of twenty-five cents was included as a charge on every description of the land sold. In the case of *Cole v. Van Ostrand, post,* p. 454, 110 N. W. 884, it is held that the failure of the treasurer to subscribe the delinquent return and the inclusion of the five per centum collection fee, as in this case, do not constitute such defects in the return as to affect the validity of the proceeding, but that the failure to transmit to the county treasurer within six days after the last legal publication the affidavit of the printer showing publication of the notice, and including a twenty-five cent charge therefor, renders the sale defective and insufficient and makes it invalid. The descriptions of the different parcels in the delinquent return are sufficiently definite to indicate with sufficient certainty the parcels on which the taxes were assessed and levied, and meet the requirements of sec. 1047, Stats. (1898), prescribing that "any descriptions of land which shall indicate the land intended with ordinary and reasonable certainty and which would be sufficient between grantor and grantee in an ordinary conveyance shall be sufficient." *Cate v. Werder,* 114 Wis. 122, 89 N. W. 822; *Boyington Co. v. Southwick,* 120 Wis. 184, 97 N. W. 903.

The claim that the tax proceedings are defective because it

is not shown that the newspaper in which the notice was published had been published continuously once in each calendar week for two years immediately before the date of such sale is not sustained. In the absence of proof showing that the newspaper was not so published, it must be presumed that it was one which met the requirements of the statute in this respect.

We find no error in the record. The trial court properly awarded judgment for the plaintiff.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied April 30, 1907.

COLE, Appellant, vs. VAN OSTRAND and another, Respondents.

January 29—April 30, 1907.

Tax titles: Quieting title: Trusts: Pleading: Mandatory statutes: Form of delinquent return: Inclusion of printer's fee, when invalidates sale: Retroactive statute: Limitations: New title created: Judgment: Due process of law: Obligation of contract.

1. In an action to quiet title to land, wherein plaintiff's claim was based on tax titles acquired either by the county or by plaintiff subsequent to the tax titles claimed by defendants, or upon deeds from prior owners, and no trust chargeable upon defendants in favor of the county or plaintiff was alleged, plaintiff was properly not permitted to show illegality in the sale by the county of the tax certificates upon which defendants' tax deeds (recorded more than three years before the action was commenced) were issued, as a basis for a claim that defendants' title was held in trust for the county and for plaintiff.
2. Sec. 1113, Stats. (1898), providing that the town treasurer's return of delinquent taxes shall be, "as nearly as convenient," in the form there given, is not mandatory; and although the form given shows a blank at the end for the treasurer's signature, the omission of such signature to the return itself does not render the tax sale based thereon void, where there is annexed to the return the affidavit of the treasurer declaring its correctness, as required by sec. 1112.

3. When such return shows one amount under the heading "Total tax," and another amount under the heading "Five per cent. collection fees," and the sum of the two amounts is made the basis of the tax sale, it will be presumed that the sum so adopted is the correct total of the true tax and the legal collection fee. *Pinkerton v. J. L. Gates L. Co.* 118 Wis. 514, distinguished.
4. Where the printer's affidavit of publication of the notice of tax sale was not transmitted to the county treasurer within six days of the last publication, under sec. 1132, Stats. (1898), the inclusion of the printer's fee in the amount for which land was sold rendered invalid the tax certificate and the deed based thereon.
5. The effect of the inclusion of such printer's fee in a particular case was not changed by the subsequent enactment of ch. 35, Laws of 1905, amending sec. 1132 so as to require merely that the printer's affidavit be transmitted on or before the date fixed for the tax sale, and validating payments of such fees theretofore made by counties.
6. Under secs. 1186, 1187, Stats. (1898), when a tax deed, fair on its face and free from jurisdictional objections and those defined in sec. 1189, has been recorded for three years, a new legal title in fee simple is created in the grantee as against all the world. A later sale for nonpayment of subsequent taxes does not act upon any rights connected with the title preceding the established tax deed, but acts upon and cuts off, or fails to cut off, according to legality of the proceedings, merely the tax title created as above described.
7. Sec. 1176, Stats. (1898), providing that a tax deed "shall vest in the grantee an absolute estate in fee simple" in the land described, refers only to *valid* tax deeds.
8. When the loss of property which a party supposed he owned results from the judgment of a court having full jurisdiction to the effect that he has no title, he is not deprived of property without due process of law.
9. Where, before a statute of limitation has completely run so as to vest title by excluding the possibility of attack thereon, the period of limitation is extended, such extension does not impair the obligation of contract or deprive any one of property without due process of law.

APPEAL from a judgment of the circuit court for Price county: A. J. VINJE, Judge. *Affirmed.*

This was a suit in equity to quiet title and bar the defendants as to certain lands in Price county. The title set up

by the plaintiff rested upon the fact that the county of Price in 1899 held tax certificates for the tax sales of 1895, 1896, 1897, 1898, and 1899, and on March 29, 1899, took out tax deed upon the certificate of 1895 for the tax of 1894, which deed was recorded on March 30th; also, the county on June 22d took out another tax deed upon the certificate of 1896 for the tax of 1895, which was recorded June 23, 1899. Thereupon the county quitclaimed to the Gates Land Company, which again quitclaimed to the plaintiff, the quitclaim being accompanied in each case by an assignment of the subsequent tax certificates. Thereupon the plaintiff took out further tax deeds on the certificates for each year and has paid all subsequent taxes. This action was commenced December 17, 1901. The defendants set up title under a tax deed or tax deeds founded upon certificates of sale upon earlier taxes and recorded on and prior to June 5, 1897, more than three years before the commencement of this action. They pleaded the various statutes of limitations in protection of their deeds and attacked the validity of plaintiff's various tax deeds for certain irregularities in the tax proceedings, not apparent upon the face of the instruments nor going to the validity or groundwork of the tax. They also counterclaimed upon their tax deeds for the quieting of their title as against the plaintiff, accompanying said counterclaim with a deposit of the amount of taxes, expenses, and interest which plaintiff had invested in her taxes and tax titles. Plaintiff replied by reassertion of the facts stated in the complaint and by general denial.

The trial court found to exist certain defects in each and all of plaintiff's tax deeds; excluded all evidence in attack upon the regularity and validity of the defendants' deeds on the ground of the statutes of limitations; required defendants to pay into court the full amount of plaintiff's taxes, interest, and expenses of taking and recording tax deeds; and on March 18, 1905, rendered judgment quieting

defendants' title in accordance with the prayer of the counterclaim, from which judgment the plaintiff appeals.

Rublee A. Cole, for the appellant.

For the respondents there was a brief by *Barry & Barry,* and oral argument by *M. Barry.*

The following opinion was filed February 19, 1907:

DODGE, J. It should perhaps be premised that this is one of four cases argued successively which present many questions common to more than one of them. The briefs for appellant are industriously confused by reference one to the other; by omitting in some all discussion of questions prominent in that particular case, and devoting much space to repetition of arguments on questions arising in others, but wholly absent in the case in hand. Thus the brief in the present case is almost entirely devoted to the contention that by reason of an illegal sale by the county of the tax certificates upon which defendants' tax deeds are founded, any title created by such deeds was held in trust for the county, and that the county's equitable title has been by quitclaim transferred to plaintiff. This claim is set forth by pleadings in one of the other cases, but is not hinted at in the pleadings in this. The sole claim of title which plaintiff sets forth in this case is based on the tax titles acquired either by the county or by plaintiff subsequent to the tax titles claimed by defendants, or upon deeds from prior owners. No stretch of liberality of construction can disclose notice by pleadings of a claim by plaintiff to any trust chargeable upon defendants in favor of the county or the plaintiff. Hence any attempt to raise that question by offers of proof below, or by argument here, properly was and must be rejected. Any attempt to attack the county's transfer to defendants' grantor, made either by a former owner or by a claimant of merely a later tax title, would be so indirect and collateral that it could not be admitted. *Sloan v. Rose,* 101 Wis. 523, 77

N. W. 895; *Kennan v. Smith,* 115 Wis. 463, 468, 91 N. W. 986. Some other questions, legitimately within this appeal, arise as follows:

1. As a basis of plaintiff's title, and therefore of her cause of action, are a series of tax deeds the validity of which is assailed on the ground of irregularities not appearing on the face of the deeds and not going to the validity of the taxes which culminated in them. Numerous irregularities are urged by respondents, but three of which shall we deem it necessary to discuss in this case. Some others of them are passed upon in *Van Ostrand v. Cole, ante,* p. 446, 110 N. W. 891.

(a) It is contended that failure of the town treasurer to sign at the end the statement or return of delinquent taxes is a fatal defect. Sec. 1112, Stats. (1898), requires the town treasurer to "make out a statement of the taxes remaining unpaid" and submit it to the county treasurer, who shall, by comparison with the tax roll, ascertain that it is correct. Thereupon the town treasurer shall make affidavit to be annexed to such statement declaring its correctness and other specified facts. Sec. 1114, Stats. (1898). The sole foundation for any supposed duty to affix signature to the statement is sec. 1113, Stats. (1898), which provides that the return "may be made in tabular form and varied as facts may require, but when so made shall be, as nearly as convenient, after the following form." The illustrative form embodied in the section shows a blank at the end for treasurer's signature. We do not think the language of this section is at all mandatory. If the required facts are clearly declared and unambiguously certified, that satisfies the purpose of the law. While the steps expressly commanded by the statutes must be taken to effect a valid tax sale, we cannot feel justified in loading the process of collecting public revenues with mere matter of form and arrangement which the statutes merely suggest but do not expressly require. No

statute does so command signature of the treasurer at the end of the delinquent list or statement, but one does require signature and oath to annexed affidavit, which, we are presuaded, furnishes all essential authentication and identification. We do not overlook the fact that in *Pier v. Oneida Co.* 93 Wis. 463, 67 N. W. 702, it was said that the omission of the town treasurer's signature to the tax return, together with two other specified defects, were sufficient to render the tax sale void. But, as this court has remarked with reference to the third of those so-called defects, it was not decided that either one alone had that destructive effect. *Allen v. Allen,* 114 Wis. 615, 91 N. W. 218. As one of the defects mentioned in the *Pier Case* was undoubtedly effective, our present conclusion that the failure of signature to the tax return is not fatal is not in direct conflict with the decision there made, and does not involve a departure from the rule of *stare decisis,* as urged by the respondents.

(b) It is objected that the tax certificates and the delinquent statements show that an excessive price was made at the tax sale by adding a sum under heading "Five per centum collection fees" to the amount specified in the delinquent return under a heading "Total amount of tax." No contention is made but that, under our tax statutes, the property is to be sold for an amount which shall include all the taxes levied thereon, plus five per cent. thereof as a collection fee, together with certain costs and expenses involved in making the sale. Sec. 1135, Stats. (1898). The contention is, however, that, under sec. 1112, Stats. (1898), it is the duty of the town treasurer to insert in his return as a single item under the heading "Total tax" the sum of such taxes, with the five per cent. fee added to them. This is predicated upon the command: "He shall make out a statement of the taxes so remaining unpaid, including the five per cent. allowed by law for collection fees;" and also upon the fact that in the form suggested by sec. 1113, Stats. (1898), there is

but one column for amounts, and that is headed "Amount of tax." As already suggested, we are not inclined to consider the form of return prescribed in sec. 1113 absolutely mandatory, if the information required to be transmitted and certified is intelligently and with reasonable certainty conveyed. It surely can do no harm that in that return is set forth in a separate column the amount of the tax not including the five per cent. collection fee, and in another column the amount of that fee. Indeed, such separation would seem more consistent with certain steps which the county treasurer is obliged to take upon the basis of the town treasurer's delinquent return; as, for example, by sec. 1114, Stats. (1898), the county treasurer, after ascertaining the correctness of a delinquent return, is to give credit to the town treasurer for the amount of the delinquent taxes, exclusive of the five per cent. collection fee; and the severance of that fee from the body of the taxes occurs at other stages of the tax procedure. These acts, of course, would be facilitated by a form of return which carried the two parts of the total in separate columns. When, therefore, a delinquent return presents one column under heading of "Total tax" and another column under heading of "Five per centum collection fees," and the sum of the two amounts is made the basis of the tax sale by the county treasurer after, as the law requires, a careful comparison by him of the delinquent return with the tax roll, we deem it clear that the presumption *omnia rite esse acta præsumuntur* justifies the court in presuming that the amount so adopted is the correct total of the true tax and the legal five per cent. collection fee. If this be contrary to the fact the proof is easy, for the tax roll of the town remains a county record as accessible as the very records of the tax sales themselves, and it is certainly no undue burden to cast upon him who would assail the integrity of the proceedings of public officers to prove the error which he asserts. In the instant case the delinquent return was still more ampli-

fied than in the form just suggested. It presents a series of columns still further classifying and itemizing the amount of the burdens. Thus it contains a column "State, county, district, and town taxes," and then a column "Road district taxes." Then comes the column "Total amount of tax," and then the column "Five per centum collection fees." The sum contained under the heading "Total amount of tax" is the total of the two sums under the headings "Road district tax" and "State, county, district, and town taxes." This serves to confirm the certainty that no excess five per cent. was included in the present sale certificates, for certainly there is no presumption that these specialized taxes have each of them been enhanced five per cent. before being brought together in the "Total amount of tax" column.

Upon this subject our attention is urged to *Pinkerton v. J. L. Gates L. Co.* 118 Wis. 514, 95 N. W. 1089, where one of the grounds of invalidity in the tax proceeding was the inclusion of an item described in the opinion, "For an additional amount equal to five per cent. of the amount of the return." As to this the court said: "No attempt is made to justify the inclusion of such additional amount." The printed case upon that appeal does not aid us at all in discovering the true state of the tax records, and obviously the court was led to the inference that this was an arbitrary and additional sum in excess of the legal five per cent. collection fee. It is not stated in that case that it was even described as a collection fee. We did not in that case at all consider or decide the construction to be given to a delinquent return which contained merely a column described as "Total tax" and an additional column for "Five per centum collection fee." If, as seems to be suggested by one of the counsel in this case who was also counsel in that, the court was in fact dealing with but a single five per cent. collection fee there, we must deplore that the record was in such shape as not to reasonably inform us of the fact.

(c) It is shown beyond controversy, in fact it is conceded, that each of the tax certificates upon which are based any of the plaintiff's tax deeds did contain a sum of twenty-five cents for printer's fee for publishing the notice of tax sale, and that in no case was the printer's affidavit of publication transmitted within six days after the fourth publication, although such affidavits were filed before the sales took place. The statute then existing is clear and unambiguous that the county shall not be liable to the printer for such fee in the event of failure to transmit such affidavit within such six days. Sec. 1132, Stats. (1898). The question was carefully considered in *Chippewa River L. Co. v. J. L. Gates L. Co.* 118 Wis. 345, 94 N. W. 37, 95 N. W. 954, where inclusion of the printer's fee, in such case, in the amount for which the land was sold and which the purchasers at the tax sale were required to pay, was held to render irregular and invalid the certificates and deeds based thereon. That case is entirely conclusive against the present deeds under which the plaintiff claims, and they were therefore properly held irregular and invalid by the trial court.

Some contention is made that the fatal character of the inclusion of this fee has been purged by ch. 35, Laws of 1905. That statute, which went into effect March 28, 1905, amended sec. 1132, Stats. (1898), so as to merely require that the printer's affidavit be transmitted on or before the date fixed for the tax sale, and by a second section provided:

"Whenever any printer shall have in good faith heretofore published the statement and notice required by sec. 1132 of the Statutes of 1898 and has been paid by the county for such services and has neglected to transmit the affidavit of such publication to the county treasurer within the time required by said sec. 1132, such payment to said printer by said county is hereby declared valid and no part of the same can be recovered from said printer by said county."

We can find nothing in this statute which even attempts to change the relative rights of landowner and tax-title

claimant as they existed before its enactment. So far as any retroactive effect is declared, it applies only to the relations between printer and the county. If the statute were much more ambiguous it would still be our duty to give it such construction, for we should be slow to believe that the legislature had attempted to make valid an invalid tax deed, thus transposing what before its enactment was a mere lien upon land into an absolute title, to clear deprivation of the owner of his property. Further, in the present case the judgment appealed from had been entered and fully perfected before this statute took effect; hence, whatever new rule of law might have been established thereby, it could not import error into a judgment already entered.

2. To avert the result of the invalidity of her tax deeds, appellant urges certain reasons why respondents should be precluded from attacking them. First among these is the asserted fiduciary character of respondents' title and the constructive trust imposed thereon in favor of the appellant, which has already been mentioned, and plaintiff's inability under her pleadings to predicate any rights thereunder declared. She also contends, especially as against defendants' counterclaim, that by reason of lapse of more than three years from the record of respondents' tax deeds any suit based thereon is barred by sec. 1187, Stats. (1898). This contention is fully considered in the opinion by my brother SIEBECKER, and overruled, in the accompanying case of *Van Ostrand v. Cole* (*ante,* p. 446).

Next appellant asserts irregularities in defendants' tax deeds, and assigns error upon the rulings of the trial court that she could not impair defendants' right either to attack her tax deeds or to claim recovery under their own by proving such irregularities. This ruling was rendered effective by excluding evidence of such defects, and was based upon sec. 1188, Stats. (1898), on which respondents now rely. Plaintiff's claim of title, it must be remembered, at least as

offered to be shown by evidence, included the title existing prior to the defendants' tax deeds and also title arising upon tax deeds subsequent to defendants'. As to the first, any affirmative attack upon defendants' tax deeds is so clearly excluded by the first portion of sec. 1188, Stats. (1898), as to preclude debate or difference of opinion: "No action shall be maintained by the former owner or any person claiming under him to recover the possession . . . or to avoid such [tax] deeds." But the further language of the same section is hardly less unambiguous and conclusive in excluding any attack by the holder of a subsequent tax deed upon the efficacy of a tax deed, duly recorded for three years, to create in the grantee a complete legal title. That section provides that such deed, if fair on its face, "shall be conclusive evidence of the existence and legality of all proceedings from and including the assessment of the property for taxation up to and including the execution of such deed." When the existence and legality of all such proceedings are established, as by the presumption they are, then, by virtue of sec. 1176, Stats. (1898), such deed "shall vest in the grantee an absolute estate in fee simple in such land." The unreasonableness of a contention that, while a tax deed after the three-year limitation may have become conclusive as against all former rights and titles, still one holding by an invalid subsequent tax deed can attack it and prove that it is in fact invalid, is apparent when we contemplate the results of such a holding. If it can be so adjudged invalid, then it conveys no title, and yet, by virtue of the conclusiveness of the statute of limitations, it has been many times held that complete title is conclusively vested. The result would be that, while all former titles were cut off, no title existed in the grantee in that tax deed, and, conceding the invalidity of the subsequent tax deed, no title exists in the grantee thereof—a situation apparently insolvable save by forcible occupation for ten years. The true rule, as gleaned from secs. 1187 and

1188, is that when a tax deed, fair on its face and free from the so-called jurisdictional objections and those defined in sec. 1189, has been recorded for three years, a new legal title in fee simple is created in the grantee as against all the world. If, by reason of nonpayment of subsequent taxes, a later sale is made, that sale does not act upon any rights connected with the title preceding the established tax deed, but acts upon and cuts off, or fails to cut off, according to legality of the proceedings, merely the tax title which has been created, as above described. *Hotson v. Wetherby,* 88 Wis. 324, 334, 60 N. W. 423; *Sloan v. Rose,* 101 Wis. 523, 527, 77 N. W. 895; *Kennan v. Smith,* 115 Wis. 463, 91 N. W. 986; *Cezikolski v. Frydrychowicz,* 120 Wis. 369, 98 N. W. 211; *Wis. River L. Co. v. Paine L. Co.* 130 Wis. 393, 110 N. W. 220. We cannot doubt that the court correctly ruled with reference to the assaults upon the regularity of defendants' tax deeds.

3. Appellant presents an apparently sincere argument to the effect that, by the judgment in this case, she is deprived of property without due process of law, to the breach of the prohibition contained in the federal constitution and its amendments prohibiting a state from enacting any law having that effect. The respects in which this constitutional right of property is claimed to have been invaded are two: First. The contention is presented that by virtue of secs. 1176, 1191, Stats. (1898), the county and its grantee, the plaintiff, were vested with complete title in fee simple to the lands involved under her tax deeds, and that judgment taking such land away from her therefore deprives her of her property. It is true that sec. 1176 does provide that the tax deed "shall vest in the grantee an absolute estate in fee simple in such land." Sec. 1191, however, merely provides that land should be exempt from taxation when the county shall have received a tax deed and shall hold unredeemed tax certificates for at least two ensuing years. It

ought to be apparent at a glance to appellant's counsel, as well as to others, that the absolute fee simple ascribed to a tax deed by sec. 1176 is dependent upon the validity of that deed. No absolute fee-simple title is conferred by an unlawful or invalid deed, save as it may result from the limitations prescribed by other statutes. Hence, when it is established that the tax deeds under which plaintiff claims were invalid and have not been cured by limitation periods, it results that she had no title, and therefore none is taken from her. Further than this, however, any loss of property which appellant supposed she had, results from the judgment of a court of competent authority, having full jurisdiction of the subject matter and of the parties in the action, where the appellant had full opportunity to be heard, and, as we judge from the record, was heard to an adequate, if not excessive, extent. Such proceeding is the most complete due process of law known to common-law jurisprudence. Hence this contention of appellant must be overruled.

The second invasion of the guarantees of the federal constitution is predicated upon the fact that in 1899, after appellant had acquired her tax certificates and had recorded the first of the tax deeds upon which she rests, but before any limitation period had run in protection thereof, the term of limitation prescribed by sec. 1189*a*, Stats. (1898), was enlarged by the substitution of three years in place of nine months, so that her deed would not become impregnable to the particular form of attack covered by that section so soon as under the law existing at the time of its issue. There are two complete answers to this complaint of appellant: First. Sec. 1189*a* regulates the limitation only of actions to attack a tax deed because void on its face. This action concedes the *prima facie* validity of appellant's deed, and is therefore wholly unaffected by that section or by the amendments thereof. Another complete answer, however, is that, until a statute of limitation has completely run so as to vest

title by excluding the possibility of attack thereon, the period of limitation is wholly within the province of a state legislature, and is not controlled by the federal provisions against either the impairment of the obligations of contract or the deprivation of property without due process of law, provided, of course, a reasonable time be allowed after the new enactment for bringing actions if the time be shortened. Wood, Lim. (3d ed.) 34; *Koshkonong v. Burton,* 104 U. S. 668; *Campbell v. Holt,* 115 U. S. 620, 628, 6 Sup. Ct. 209; *Wheeler v. Jackson,* 137 U. S. 245, 11 Sup. Ct. 76; *Relyea v. Tomahawk P. & P. Co.* 102 Wis. 301, 305, 78 N. W. 412; *Lawton v. Waite,* 103 Wis. 244, 257, 79 N. W. 321.

We find nothing in the record which can justify a reversal of the judgment.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied April 30, 1907.

GOOD LAND COMPANY, Respondent, vs. COLE, Appellant.

January 29—April 30, 1907.

Corporations: Married woman as incorporator.

Under sec. 1771, Stats. (1898), providing that "three or more adult persons, resident of this state, may form a corporation," etc., a married woman may be an incorporator, even though her husband also is one.

APPEAL from a judgment of the circuit court for Price county: A. J. VINJE, Judge. *Affirmed.*

This is an action in ejectment. Plaintiff, a corporation, demanded possession of the premises, damages for the unlawful detention, and for costs. Defendant in his amended answer denies the legal and due incorporation of the plaint-

iff, in that two of the three incorporators were husband and wife at the time the corporation was formed. Plaintiff submitted evidence of incorporation and evidence showing title through tax deeds recorded April 17, 1895, and on May 31, 1895. This evidence was objected to on the ground that the incorporation was invalid as above stated, and, as to the tax deeds, on the ground that the action was barred under sec. 1187, Stats. (1898). These objections were overruled.

Defendant's title was based on tax deeds recorded May 29, 1902, on a tax deed recorded June 1, 1904, and on a tax deed issued June 13, 1903. Evidence of title through which defendant claimed, originating more than three years before the recording of the tax deeds through which plaintiff claimed, was rejected by the court. Plaintiff introduced evidence of the tax proceedings prior to the issuance of defendant's deeds, from which it appeared that there were irregularities in the return of the delinquent taxes by the town treasurers. These irregularities consisted in the failure of the town treasurers to subscribe the return at the end, in the omission of a return of the delinquent personal taxes with the delinquent taxes on real estate, or a return that there were none, and in incomplete and indefinite descriptions, in not repeating town, range, and section descriptions for each parcel. The proof of publication was defective in not stating that the notices had been published "once in each week for four successive weeks" prior to the date of sale, and in a newspaper which has been published "regularly and continuously . . . once in each calendar week for at least two years before the date of such notice." Sec. 1130, Stats. (1898). The proof of publication was not transmitted to the county treasurer within six days after the last publication of the notice—sec. 1132, Stats. (1898); and one item in the charge included in making the sale was a printer's fee of twenty-five cents.

Defendant alleged, and on the trial urged, that the action

was barred under the provisions of secs. 1187, 1188, 1210*h*, and 1189*a*, Stats. (1898).

By the judgment of the court defendant was allowed the sums he had paid for taxes, interest, and charges in procuring his tax deeds and the amounts paid in subsequent tax sales. Plaintiff was allowed costs. This is an appeal from the judgment.

Rublee A. Cole, for the appellant.

For the respondent there was a brief by *Barry & Barry*, and oral argument by *M. Barry*.

The following opinion was filed February 19, 1907:

SIEBECKER, J. In this case appellant raises all of the questions presented in the case of *Van Ostrand v. Cole, ante*, p. 446, 110 N. W. 891. We find the facts bearing on these questions are the same in the two cases, and the decision upon them in the companion case rules this one in respect to all the questions so presented.

Appellant, however, raises the question that plaintiff has no corporate existence and hence cannot maintain this action. Sec. 1771, Stats. (1898), provides that "three or more adult persons, residents of this state, may form a corporation" in the manner and for the purposes therein provided. The claim is made that married women are not empowered within the provisions of this law to exercise the rights of an "adult" person, and that, if a married woman is empowered to exercise the rights of an "adult" person under the provisions of this statute, still plaintiff's alleged incorporation is invalid because two of the three "adult" persons who attempted to incorporate were at the time of its organization husband and wife. The act of forming a corporation as provided by this statute, as between the parties to the undertaking, is in its nature contractual. In this view it seems a natural consequence that any three adult persons having the power to contract may form a corporation upon compliance with and in

the manner prescribed by the statute. Appellant suggests that a married woman's common-law disabilities to contract persist as to the exercise of this right. The acts involved in forming a corporation and in becoming a stockholder in it are alike in their character, and no valid reason is suggested why the statutes removing the common-law disabilities of married women should not apply with equal force to both, and, if she is empowered to make contracts respecting the purchase and ownership of stock in a corporation, it seems but a logical inference that she may be a corporator of a proposed corporation. The right to acquire, own, and transfer property and to conduct her separate business as if she were unmarried involves the exercise of privileges in their nature like those involved in acquiring the right to exercise the corporate powers and privileges bestowed by the statute. We are cited to no authority, and from our investigation it seems this question has but seldom called for judicial determination.

In *Bundy v. Cocke,* 128 U. S. 185, 9 Sup. Ct. 242, the competency of a married woman to become a shareholder in a corporation was involved, and it was held that the statute of Arkansas removing the common-law disabilities of a married woman as to contracts respecting her separate property and business enabled her to assume such obligations. In an opinion of the attorney general of Pennsylvania, reported in 18 Pa. Co. Ct. Rep. 492, the qualification of a married woman to become a corporator of a proposed corporation under the Pennsylvania statute was presented, and the conclusion reached that the married woman's act of that state, removing the common-law disabilities by reason of coverture, enabled her to become a corporator of a corporation upon the ground that such a right grew out of the contractual capacity bestowed upon her by such enabling laws. 10 Cyc. 166, F, 4; *Witters v. Sowles,* 38 Fed. 700. The power of a married woman to exercise the right to contract concerning her separate property and business is fully established by the law of this state and needs no further discussion. See *Kriz v. Peege,*

119 Wis. 105, 95 N. W. 108; *Citizens' L. & T. Co. v. Witte,* 116 Wis. 60, 92 N. W. 443, and cases there cited. We are of the opinion that the term "adult persons," as used in sec. 1771, Stats. (1898), includes a married woman, and that she has the right to be a corporator of a corporation under the laws of this state.

It is urged that the decision in *Fuller & F. Co. v. McHenry,* 83 Wis. 573, 53 N. W. 896, where it is held that a husband and wife cannot form a copartnership, because the legislature did not intend that such relations as flow from a copartnership in trade should exist between them, controls the situation presented here. The question there involved was whether the common-law disability of a wife to form a copartnership with her husband had been removed, and it was held that the married woman's act did not contemplate the removal of this particular disability. The decision went upon the ground that the legislation upon this subject contemplated "that the gains the wife should make in the exercise of her limited business powers should be her *sole* and *separate* property, and not be in any way subject to the interference, control, or disposal of her husband." The decision places stress upon the point that the partnership relation would enable the husband to exercise control over a wife's property contributed to a partnership such as the statutes seek to prevent, and thus frustrate the objects of these enabling statutes. These reasons do not, however, apply to the case before us. The investment by a wife of her separate property in a corporation in which she and her husband are corporators gives the husband no control over it by reason of their relation to the corporation. A stockholder does not hold the relation of a copartner to the corporation or to the other holders of stock in the corporation. Ownership of stock or an interest in the corporate property by a married woman gives her husband, though he may also own stock in the corporation, no right to control her separate property or to manage her separate business. 1 Cook, Corp. (5th ed.) §§ 10, 11;

10 Cyc. 373. We must hold that the fact that Anna A. Van Ostrand was a corporator of the plaintiff corporation does not affect its legal existence.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied April 30, 1907.

OTT, Appellant, vs. BORING, Executor, Respondent.

January 31—April 30, 1907.

(1-7) *Contracts: For services: Acceptance: Partnership: Construction: Limitations: When cause of action accrues: Demand of performance: Laches: Estates of decedents.* (8-11) *Appeal: When jurisdiction of supreme court terminates: Remitting record: Motions, when must be made.*

1. Defendant's testator, one P., having a stock of dry goods worth about $10,000, proposed to plaintiff that if the latter would go with him to another city where he intended to establish a dry goods business, and would remain with him until he should be able to draw from the concern $10,000, besides "keeping the stock up" and paying expenses, he would pay plaintiff $15 per week, and when he should be able to draw from the business as aforesaid he would give plaintiff a one-fourth interest in the store, this being intended as additional pay, and plaintiff being expected to use his best endeavor to "make the store the greatest success possible." Plaintiff at once commenced, and until P.'s death continued, to comply on his part with the terms of the proposal. *Held*, sufficient to show that plaintiff accepted the proposal as a whole and not merely as to the weekly compensation.
2. No partnership *in præsenti* was created by such proposal and its acceptance.
3. By the phrase "keeping the stock up," in the contract, was meant the maintenance of such a volume and variety of merchandise as would best promote the ultimate purpose of making the store the greatest success possible.
4. Not until P., in the exercise of honest and reasonable judgment, deemed that he was able to draw $10,000 from the concern, consistently with keeping the most advisable volume of business,

would plaintiff have the right, under the contract, to demand the transfer of a one-fourth interest.

5. The fact that for about seventeen years after the making of the contract, and until his death, P. refrained from drawing the $10,000, and kept it in the business to enable the advancement and increase thereof, shows conclusively, as against him and his personal representatives, that the time did not come during his life when he was able to withdraw said sum and "keep the stock up," in the contractual sense of those words; hence that no cause of action upon the contract or for breach of it arose in his lifetime, against which any statute of limitation ran.

6. Until a demand by the plaintiff and refusal by P. to perform the contract according to its terms, or until repudiation of the agreement by P., no cause of action at law for money could accrue to the plaintiff; and the statute of limitations would not begin to run until the cause of action had accrued.

7. Plaintiff's failure to demand transfer to him of a one-fourth interest in the business during P.'s lifetime,—he having no reason to suppose that P. was acting otherwise than in good faith in continuing to postpone the time for withdrawal of the $10,000,—did not, under all the circumstances, constitute laches on the part of the plaintiff, precluding his recovery of the value of said interest after P.'s death.

8. When the record upon an appeal to the supreme court has been regularly transmitted to and filed with the court from which it originally came, the jurisdiction of the supreme court over the cause, as also to vacate or modify its own judgment, is at an end.

9. Under sec. 3071, Stats. (1898), it is the duty of the clerk of the supreme court to remit the papers in a case to the trial court within sixty days after the decision of the appeal, unless the court directs them to be retained to enable a party to move for a rehearing; and at the expiration of the sixty days if no such direction has been given, or whenever, without disobedience of any rule or order of the court, the clerk actually transmits the papers within the sixty days and they are filed in the court below, the jurisdiction of the supreme court is terminated.

10. The termination of the jurisdiction of the supreme court when the record has been transmitted as stated does not affect its power to correct the mere record of its judgment so as to make the record properly express such judgment.

11. Under Supreme Court Rule 42 all motions in the nature of a motion for a rehearing (as one to modify the judgment or mandate) are, like motions strictly for a rehearing, to be made within the thirty days during which, by Rule 37, in all cases the papers are directed to be retained.

APPEAL from a judgment of the circuit court for Ashland county: E. B. BELDEN, Judge. *Reversed.*

A claim filed in county court against the estate of Franklin J. Pool, deceased, there disallowed, and appealed to the circuit court, where the case was tried without a jury. It appeared, substantially without dispute, that in 1887 the deceased was engaged in business at Chicago as a dry goods merchant, and proposed removing his residence and business to Ashland, Wisconsin. He had a stock showing, by inventory, about $19,000, which, in conference with the plaintiff, was deemed to be worth approximately $10,000. He wrote the plaintiff on October 17, 1887, the following proposal:

"If you will go with me to Ashland and remain with me until I shall be able to draw from the concern the sum of ten thousand dollars besides keeping the stock up and paying personal and store expenses I will pay you fifteen dollars per week, and at the end of such time as I may be able to draw from the business as above stated, I will give you a one-fourth interest in the store. This is intended as additional pay, and you are expected to use your best endeavor at all times to make the store the greatest success possible."

Plaintiff accordingly went with deceased to Ashland, where a dry goods business was established in the name of F. J. Pool, and so conducted thenceforward to the time of Pool's death in July, 1904. Plaintiff drew, through all that time, compensation of $15 a week, except that, from some date in 1900, he was paid $17.31 a week—by what arrangement is not shown by reason of exclusion of plaintiff's testimony. He retained at all times the written proposal above stated, but there is no evidence that the subject was ever referred to between him and Pool. The business management was entirely with Pool, but plaintiff was distinguished from other clerks by being placed in command thereof whenever Pool was absent, and by having the duty generally of supervising all details arising in the sale of goods. He was also distinguished by the fact that he, alone, carried a key to the store, opened it in the morning and frequently fastened it up at night.

The business prospered, and was steadily enlarged in volume so that the net balance of book assets appearing by the inventory of 1889 was $29,000; in 1890 $37,000; in 1896 $19,000; in 1897 $71,000, and thence increased until at the time of Pool's death such balance was $119,000,—the small amount shown in 1896 being due to a fire which destroyed a large part of the stock on hand, for which, however, some $50,000 of insurance was collected and entered into the footing of the following year, 1897. Pool never withdrew any money from the business, except trifling amounts for current family expenses, which were charged to him on his books, and goods from the store taken and used by his family, for which no charge whatever was made, until about the year 1900, when he purchased some real estate in Ashland, not for the purposes of the business, and drew out $2,500 to pay therefor. After the recovery of the insurance money and in 1896 he loaned to or deposited with J. V. Farwell & Co., from whom he had always bought large quantities of goods, the sum of $15,000, entering the same as a charge on the books of the company and taking a demand due bill therefor, which was at all times treated as a business asset. This loan remained up to the time of his death.

Immediately after Pool's death plaintiff, by virtue of the opportunities of his position, was in apparent physical possession of the store and property, and notified the widow and adult son that he claimed to be in lawful possession by virtue of his one-quarter interest therein in pursuance of the writing above set forth. The attorneys for the respective parties conferred, and, in order to avoid unseemly clash and injury to the business, plaintiff surrendered up the manual possession to the representatives of Pool upon an agreement that no rights should be lost thereby, and thereupon presented claim to the county court which, as amended in pleading in the circuit court, is somewhat ambiguous. It is, apparently, a claim for $30,000 in money as the value of a one-quarter interest

in the entire assets of the business; such one quarter having been taken and being held by the representatives of Pool.

The court found that, as early as the inventory of 1889, Pool was able to draw from the concern the sum of $10,000, besides keeping the stock up and paying the store and personal expenses, and that more than six years before his death he did draw from the concern more than $10,000, referring to the loan to Farwell; and, as conclusion of law, that, if ever valid, the claim of the plaintiff is barred by the statute of limitations. In an opinion filed by the trial court some other grounds of disallowance are stated. Judgment was thereupon entered disallowing plaintiff's claim, from which he brings this appeal.

For the appellant there were briefs by *Sanborn, Lamoreux & Pray,* attorneys, and *Burr W. Jones* and *H. B. Walmsley,* of counsel, and oral argument by *Mr. Jones, Mr. F. B. Lamoreux,* and *Mr. Walmsley.*

For the respondent there was a brief by *Tomkins, Tomkins & Garvin,* and oral argument by *W. M. Tomkins.*

The following opinion was filed February 19, 1907:

DODGE, J. 1. The first position contended for by respondent, and adopted by trial court in an opinion filed, was to the effect that the evidence did not disclose an acceptance by the plaintiff of the written proposition quoted in the statement of facts, except as to the $15 per week compensation. The evidence on the subject is that the plaintiff received this proposition and, immediately thereafter, commenced and has continued to comply in all respects with the terms thereof on his part. From such facts no reasonable inference can be drawn that his intention was to accept only one part of the tendered compensation to him for such acts and to reject the other part. If the acts of the plaintiff in going to Ashland and associating himself with Mr. Pool were done in response to this proposition, they are plenary proof of the acceptance thereof ac-

cording to its terms, in the absence of any evidence to show a contrary purpose or understanding.

2. There is considerable confusion in the contentions made by different counsel for appellant as to the force and effect of the contract resulting from Mr. Pool's written proposition and plaintiff's acceptance thereof. At one moment they seem to contend that a partnership was immediately created thereby, and at another that it was a mere employment with a promise of additional payment at some indefinite date in the future; but whether that additional compensation was to be in the form of a partnership, or a mere transfer of title to one quarter of the property in the business, they are not very clear, nor, indeed, whether the contract was self-executing so that at some time an interest did, by force of law, vest in plaintiff, or some conveyance from Pool was necessary. After a careful examination of the writing in the light of the conduct of both parties, which certainly indicated complete concurrence by them in their understanding of their relations, we think it plain that no copartnership was originally formed between them. Mr. Pool's agreement was that some time in the future, in a certain contingency, "I will give you a one-quarter interest in the store," and the conduct of the parties at all times was consistent with the understanding that Mr. Pool was the owner of this business, exercising full autonomy and control thereover as owner, and that the time had never come when he had executed that promise by giving or transferring any part of the ownership thereof to the plaintiff. This view, of course, might not be inconsistent with the idea that some equitable rights had existed in the plaintiff at all times such as to enable him to protect against unreasonable or destructive conduct upon the part of Pool in managing the business so as to impair the probability that the time would ever come when plaintiff would be entitled to an interest, or would impair the value of that interest when such time did come, thus imposing a trust or fiduciary quality upon Pool's

title and management. This right might well exist without any actual ownership having yet been acquired. Suffice it to say that it is obvious that Mr. Pool's management never did at any time arouse disapproval by the plaintiff, but that he seems at all times to have had entire confidence in the wisdom and fairness thereof.

Having concluded that this was a contract that at some time Mr. Pool was to transfer to plaintiff a share either in the property or business, the next question of construction is when that duty was to be performed, so that if the transfer were not made Mr. Pool was in default and the plaintiff had a present complete cause of action. The proposition itself prescribed the time as "when I shall be able to withdraw from the concern the sum of $10,000 besides keeping the stock up." The view contended for by the respondent, and adopted by the trial court, was that, whenever that business had so increased that it was possible to withdraw $10,000 and leave a stock equal to that existing at the time of the contract, the agreement had been fully performed by the plaintiff and the transfer was due. We are persuaded that this is altogether too narrow a view of the situation. These parties, or rather Mr. Pool, was about to establish a business in Ashland, obviously with the expectation of a successful development thereof. Naturally, he hoped that the new city and surrounding country would grow in population, and, as phrased in the very proposition, the purpose of associating plaintiff with himself was "to make the store the greatest success possible." Obviously that was not to be accomplished by operating with a stock confined to some $10,000 in value, as at the start. It involved increasing varieties of goods, or departments, increasing volume of stock in each department, and, undoubtedly, the building up of a larger business. This hope and expectation is well illustrated by the course of events, fully understood by Pool and, at least in a degree, apparent to plaintiff, and obviously acquiesced in by both par-

ties as in accordance with their hope and purpose. In two years the net inventory worth of the business had been increased to $29,000, in three years to $37,000, and so onward, until in 1897 it reached $71,000 and in January, 1904, $119,000. Mr. Pool had deemed necessary, or at least advisable, for the proper development of the business to organize it on the lines of what is called a department store, so that, instead of the little establishment such as originally opened, the various kinds of goods were classified into departments, necessitating a department head to keep track of the demands and to see that every department was equipped with such supplies of goods in quantity and variety as would meet the demands of customers, and attract others, in competition with other dealers. We reach the conclusion that "keeping up the stock" in this contract was used and understood by both parties to mean the maintenance of such a volume and variety of merchandise as would most enhance the ultimate purpose of making the store "the greatest success possible," and that only when, consistently with the most effective promotion of that purpose, Mr. Pool could withdraw from the business $10,000, should he be under obligation to perform his promise to give the plaintiff the one-quarter interest.

Further than this, it is undisputed that the whole policy of the business rested with Mr. Pool and that such was the contemplation of the parties from the first. He decided what stocks to buy, what departments to establish, what credits to give, and what extent of indebtedness to incur. With him rested the judgment and discretion as to what were the needs of the business, and he, better than any one else, was capable of deciding when, consistently with the best policy, he was able to withdraw $10,000. Just this situation must have been in the contemplation of the parties, and just this autocracy would doubtless have been insisted on by Mr. Pool had any question arisen in regard to it. Plaintiff's confidence in Mr. Pool's ability, wisdom, and integrity is obvious through-

out. So that there can be little doubt that this contract, as between the parties, meant that not until Mr. Pool, in the exercise of honest and reasonable judgment, deemed that he was able to withdraw this sum, consistently with keeping up the most advisable volume of business, should plaintiff have the right to demand a transfer of one quarter thereof. Doubtless here, again, if difference of opinion arose and plaintiff felt that Mr. Pool was unreasonably delaying the consummation of his rights to share in the business, he could have made demand, and, if that demand were resisted, could have made application to a court to inquire whether the situation was such that Mr. Pool, in the reasonable exercise of his judgment, could say that it was still for the promotion of the purposes of their association to further continue building up the business with the retention of his original $10,000 capital. But, during all these years, the action of Pool in refraining from withdrawing such money and continuing it in the business to enable its further advancement and progress and in increasing the establishment was a most unambiguous assertion on his part that the time had not come when, under the terms of the contract, he was able to withdraw it and keep up the stock, and, so long as plaintiff was willing to assent to this view, it could not lie in the mouth of either Mr. Pool or his representatives to assert the contrary; especially as plaintiff was not informed at any time of the exact business conditions, although, of course, as a man of reasonable intelligence he knew that the business was largely expanding and the stock greatly increasing. He was not informed or shown the net results of the annual inventories and balance sheets; he was not informed to what extent the enlarged stock was offset by indebtedness, so that the safety of the business might be impaired by the withdrawal of so large a sum as $10,000, and meanwhile Mr. Pool continued, at least till 1900, within the limitation period, to receive *Ott's* services, necessarily increasing in amount and

value with the enlargement of the business, at the original weekly stipend, which it is difficult to believe would have been considered reasonable by either party but for the promised contingent compensation.

One event is claimed by the respondent to have marked a time when, beyond dispute, it is established that $10,000 could with safety have been withdrawn by Mr. Pool. That is a time when, after the stock had been largely destroyed by fire and after a considerable period of litigation, some $50,000 of insurance money was collected, and Mr. Pool in 1896 made a demand loan of $15,000 thereof to J. V. Farwell & Co., of Chicago, from whom he was accustomed to buy very largely the goods for the business, and it transpired that this credit was never drawn upon for the purchase of goods, but remained as a loan up to the time of Mr. Pool's death, interest being paid or credited periodically. This credit was never treated as withdrawn from the business. It was carried as an asset upon inventory and the recurring interest was applied from time to time upon bills of goods purchased from Farwell. The loan was made at a time when a wholly unusual quantity of money was on hand and when the question as to the extent to which the replacement of the stock destroyed by fire would demand the actual use of money was uncertain, and was a transaction with a concern upon whom obviously the business was dependent in large part for the supply of its merchandise under favorable circumstances. We are not prepared to say that, in Mr. Pool's judgment, such a sum as this might not well be used in that way in the business as promotive of its prosperity, and that his very act in treating it as still in and of the business instead of belonging to himself separate and apart therefrom was an assertion of the fact that he did not withdraw it and did not deem it best so to do.

We reach the conclusion that Mr. Pool's acts show conclusively, as against him and his representatives, that the time

never did come when he was able to withdraw $10,000 and keep up the stock in the contractual sense of those words; hence that no cause of action upon the contract or for breach of it arose in his lifetime against which any statute of limitations ran. When his death came, of course he could not launch the contemplated partnership, if such were the contemplation, and his representatives refused plaintiff a share in the property, so that a money cause of action then arose independently of whether any action to specifically perform the contract might have been instituted. *Hill v. Palmer,* 56 Wis. 123, 129, 14 N. W. 20; *Treat v. Hiles,* 68 Wis. 344, 32 N. W. 517; *Seymour v. Cushway,* 100 Wis. 580, 593, 76 N. W. 769.

Much the same conclusion results from the consideration that no money demand at law could accrue in plaintiff's favor until a demand by him and refusal by Pool to perform the contract according to its terms. Thereby, as we have expressed our view of its construction, Pool agreed, upon a certain contingency, either to form a partnership with *Ott* or to convey to him one fourth of the net assets of the business after deducting $10,000. Any action upon the contract must have sought enforcement of that particular duty. Money liability could arise only upon refusal of a demand that it be performed. *Martin v. Fox & Wis. Imp. Co.* 19 Wis. 552, 558; *Noonan v. Ilsley,* 21 Wis. 138, 143; *Linderman v. Disbrow,* 31 Wis. 465; *Bannister v. Patty's Ex'rs,* 35 Wis. 215. Such demand and refusal were essential to the existence of a cause of action for money, not merely a step in the remedy to enforce it. Under our statute of limitations, especially sec. 4249, Stats. (1898), the time does not run until complete accrual of the cause of action. Therefore, where some condition precedent to the right of action exists, whether it be a demand and refusal or some other act or contingency, the cause of action does not accrue, nor the statute begin to run, until that condition is performed. *Noonan v. Ilsley, supra;*

State ex rel. G. B. & M. R. Co. v. Jennings, 48 Wis. 549, 4 N. W. 641; *Tucker v. Grover,* 60 Wis. 240, 19 N. W. 62; *Wells v. G. B. & M. C. Co.* 90 Wis. 442, 64 N. W. 69; *Lowe v. Ring,* 106 Wis. 647, 82 N. W. 571; *Morey v. Fish Bros. W. Co.* 108 Wis. 520, 84 N. W. 862; *Buttles v. De Baun,* 116 Wis. 323, 327, 93 N. W. 5; *Koelzer v. First Nat. Bank,* 125 Wis. 595, 104 N. W. 838; *Chew v. Baker's Adm'rs,* 4 Cranch C. C. 696, Fed. Cas. No. 2,663; *Eames v. Savage,* 14 Mass. 425; *Cole v. Wright,* 70 Ind. 179; *Quinn v. Gross,* 24 Oreg. 147, 33 Pac. 535; *Hill v. Haskin,* 42 Cal. 159; *Martin v. Walker,* 68 Cal. 317, 9 Pac. 185; *Lincoln v. Purcell,* 2 Head, 143.

It should perhaps be recognized, parenthetically, that the universality of the above rule is subject to some exceptions in certain jurisdictions, as, for example, where the defendant has so unambiguously repudiated his duty as to show that demand would be futile, or where the condition precedent to suit is merely a step in the remedy and is wholly within plaintiff's control (*Stillwater & St. P. R. Co. v. Stillwater,* 66 Minn. 176, 68 N. W. 836; *Schriber v. Richmond,* 73 Wis. 5, 40 N. W. 644), or the delay of the plaintiff in making demand constitutes laches (*State ex rel. Slingerland v. Norton,* 59 Minn. 424, 61 N. W. 458). To what extent such exceptions should be approved we need not declare, for the instant case does not involve them. True, respondent claims that laches, generally, ought to be ascribed to appellant, but we can discover no facts which need have urged an ordinarily prudent and intelligent man to take action. As we have concluded the parties must have understood this contract, the initiative, at least to declare the period when wise business policy justified withdrawal of $10,000, rested with Pool. He, presumptively, had in mind the existence of his contract with appellant, and the latter had no reason to suspect that he was acting otherwise than fairly and honestly in continuing the postponement of that time. Plaintiff was not in-

formed of the financial condition nor the credit of the business, or other elements bearing upon its needs. He was industriously performing his part of the contract, and Pool was accepting that service at a weekly stipend which, it is clear, the parties understood was meager for the laborious and responsible service rendered. Plaintiff's interests were enhanced by continuance of this capital in the business, and Pool's might have been if it yielded greater profits than it would earn interest if withdrawn, as to which he alone could judge. In all this situation we can see no reason why plaintiff should not yield to Pool's judgment and presumptive wish. The loan to Farwell is pressed on our attention again in this connection, but plaintiff is not shown to have had any sufficient knowledge of either the amount or the terms of that transaction as to suggest that it constituted any withdrawal of capital from the business or a declaration by Pool of termination of the pre-existing contract relations. The situation was one to emphasize a rule laid down in some cases, that, where all knowledge and control is with one party, the other may assume that conditions continue without change until informed to the contrary by the party having knowledge and power or election to change them. *Neilson v. Grignon,* 85 Wis. 550, 553, 55 N. W. 890; 19 Am. & Eng. Ency. of Law (2d ed.) 195; *Chew v. Baker's Adm'rs,* 4 Cranch C. C. 696, Fed. Cas. No. 2,663; *Quinn v. Gross,* 24 Oreg. 147, 33 Pac. 535; *Perry v. Smith,* 31 Kan. 423, 2 Pac. 784; *Cooper v. Cooper,* 132 Ill. 80, 23 N. E. 246; *King v. Rice,* 12 Cush. 161. We are persuaded that, under the circumstances of this case, the absence of any repudiation of the contract, or of plaintiff's rights thereunder, by word or act of Pool, and the absence of demand for execution of the contract, exclude the accrual of the present cause of action at any time prior to Pool's death so as to start the statute of limitations.

Our conclusion is that appellant has established his full

and complete performance of a contract according to the terms of the written proposal of October 17, 1887; that action for neither the share of the property thereby promised, nor for its equivalent in money, is barred by any statute of limitations, and that his recovery should be the money value of the one-fourth interest in the net money worth of the business at the time of presenting his claim in county court, less $7,500, being the balance of the $10,000 which Pool was entitled to withdraw; from which quarter should be deducted plaintiff's unexplained drafts from the business of $2.31 per week, in excess of the agreed $15, from some time in 1900; and that the balance should draw interest from the date of filing claim in county court. Since neither the net money value of the property of the business, nor the exact period of the excess weekly stipend, have been found by the trial court, and the evidence thereon is not clear, we deem it safer that those questions be considered and passed on in that court in the light of such further evidence thereon as may be presented.

By the Court.—Judgment reversed, and cause remanded for further proceedings in accordance with the foregoing opinion.

On motion to recall the record from the circuit court: The judgment of this court reversing the judgment below was rendered and entered February 19, 1907. On March 25, 1907, the plaintiff paid the clerk's fee, applied for the issue of a *remittitur,* and, accordingly, one was issued by the clerk and the record transmitted to the circuit court for Ashland county, where, according to the affidavits, it was filed on March 27th, and notice thereof given to the respondent on March 29th. At that time, and almost continuously from soon after the announcement of our decision, the defendant was busy obtaining affidavits of newly-discovered evidence as a basis for a motion to this court to modify the mandate

so as to permit the trial court to hear and pass upon a motion for a new trial. He served notice of such motion on April 2d, returnable April 12th, and filed the same in this court on April 3d. On April 1st he attempted to induce the clerk of the circuit court to return the record here, but failed, and on April 4th, conceiving that the presence of the record upon our files was necessary to the hearing of the said motion, he procured an order to show cause, returnable on April 9th, why the *remittitur,* record, and files should not be transmitted to the clerk of this court by the clerk of the circuit court for Ashland county, and why he should not have such other relief as might be just. On April 9th that motion was heard and is now to be decided.

W. M. Tomkins and *R. Sleight,* for the respondent, in support of the motion.

For the appellant, opposing the motion, there was a brief by *Sanborn, Lamoreux & Pray,* attorneys, and *Burr W. Jones,* of counsel, and oral argument by *Mr. F. B. Lamoreux* and *Mr. Jones.*

The following opinion was filed April 30, 1907:

DODGE, J. The salient facts are that the record remained here more than thirty days after the rendition of judgment; no application was made to this court for an order to retain it longer; it was remitted in less than sixty days, and the present motion to secure its return was made within the sixty days but after *remittitur* was filed in circuit court. The contention on the part of the plaintiff is that when the *remittitur* was regularly and in obedience to law transmitted to the circuit court the jurisdiction of this court over the cause, and consequently power over its judgment, terminated, and that it has no power either to act upon that judgment or to recall the record from the circuit court. The contention of the defendant is that, by virtue of the statute, our jurisdiction persists during a period of sixty days from

the judgment, and that the mere physical transmission of the record can have no effect upon it.

The question of the period of jurisdiction of purely appellate courts is a somewhat intangible one, and not to be decided always upon the same principles and considerations as those which regulate the jurisdiction of courts of general jurisdiction having the function not only of trial and judgment, but also of execution of the judgment. It seems from an examination of the authorities to be well-nigh unanimously declared that, in the absence of statute making a different provision, the jurisdiction of the appellate court over a given cause terminates whenever regularly, without inadvertence or fraud, it returns the record to the court of general jurisdiction. 2 Ency. Pl. & Pr. 359, 384; 2 Spelling, New Tr. & App. Prac. §§ 733, 734; Hayne, New Tr. & App. § 293; *Legg v. Overbagh,* 4 Wend. 188; cases collected in note, 21 Am. Dec. 118; *Delaplaine v. Bergen,* 7 Hill, 591; *Browder v. McArthur,* 7 Wheat. 58; *Peck v. Sanderson,* 18 How. 42; *Underhill v. Jericho,* 66 Vt. 183, 28 Atl. 879; *Sullivan v. Speights,* 14 S. C. 358; *Caldwell v. Bruggerman,* 8 Minn. 286; *Dempsey v. Billinghurst,* 7 S. Dak. 564, 64 N. W. 1124; *Leese v. Clark,* 20 Cal. 387; *Richardson v. Chicago P. & P. Co.* 135 Cal. 311, 67 Pac. 769; *Ward v. Springfield F. & M. Ins. Co.* 12 Wash. 631, 42 Pac. 119; *State ex rel. Haskell v. Faulds,* 17 Mont. 140, 42 Pac. 285. This apparently rests largely upon the doctrine that when that act is done the jurisdiction of the lower court, which has been suspended meanwhile, becomes re-established, and that both courts cannot have jurisdiction over the cause. Generally, too, it is held, in the absence of statute, that the power of an appellate court over its judgment, like that of courts generally, persists to the end of the term at which the judgment is rendered, and then absolutely terminates, except as it may be terminated earlier by the retransmission of the cause to the trial court. This court's power over its judgments seems

to have had no statutory regulation, either by way of limitation or extension, until 1860, when was enacted ch. 264, of which sec. 7 provided that the clerk of this court should remit the papers within thirty days after the judgment, "unless the supreme court, on application of either of the parties, shall direct them to be retained for the purpose of enabling such party to move for a rehearing." In 1878 "sixty days" was substituted for "thirty days" in that statute. Sec. 3071, Stats. (1898). After the passage of the law of 1860, and in 1874, the court gave general direction to its clerk to retain all records for the full thirty days, in absence of consent of parties to the contrary. See *Pringle v. Dunn,* 39 Wis. 435, 442. That direction later became crystallized in a rule which, prior to the revision of rules in 1906, was embodied in Rule XX, and is now embodied in Rule 37. The argument is that the intention of the legislature to be gleaned from the act of 1860 and its subsequent amendment is to enact that the jurisdiction of this court for the purposes of rehearing shall persist for a period of sixty days, and thereby is repudiated the previously well-established doctrine that it could not persist for any time after the transmission of the record. It will be at once observed that there is nothing in the words of the statute at all necessarily declaring such purpose. The statute, instead of ordering that the record shall remain or that jurisdiction shall persist during the sixty days, commands that the clerk shall remit the record within that sixty days. Hence, at any period after the rendition of the judgment, when he does remit, he acts in obedience to the statute, except as his duty is controlled by the rule of court prohibiting such transmission within the first thirty days. It is pretty clearly indicated that the legislature did not intend to abrogate or repudiate the doctrine of the necessity of the presence of the record for any motion for a rehearing, for they expressly authorized the court to keep the record here throughout said sixty days "for the purpose of en-

abling such party to move for a rehearing"—a very clear intimation of the supposition of the statute makers that such retention was necessary to enable such a motion. It should perhaps be remarked here, for clearness of terminology, that the words "motion for a rehearing," as used in this statute, and as we have thus far used them in this opinion, are to be construed broadly, as including any motion involving a setting aside or modification of the judgment actually rendered by the court, inclusive both of the motion for a rehearing, strictly so called, and those motions for the modification of a judgment, but not for a re-argument of the case, which have come to be termed motions in the nature of a motion for a rehearing. *Hocks v. Sprangers,* 113 Wis. 123, 89 N. W. 113.

It appearing, as we have already stated, that the statute in question can only receive the effect claimed for it by the defendant by some construction and not by the necessary force of its words, we turn to the construction which it has received from time to time by the court. From a pretty complete examination of all cases bearing upon it, it may be confidently asserted that in no case has the court entertained a motion for a rehearing, or one of that nature, after the record had passed to the court below, and in a number of cases the court has refused to entertain such a motion upon the ground clearly declared that the remission of the record had taken away its power to do so, although it is also true that in the great majority, if not in all, of such cases there may have been as another ground of loss of jurisdiction the expiration of the entire statutory period permitted for the retention of the record. The cases are numerous, but an express reference to a few will suffice. The first case is *Ogilvie v. Richardson,* 14 Wis. 151. At that time the statute required remission of the record within thirty days and the rules required a motion for rehearing to be made within twenty days. 3 Pin. 503. The decision was rendered July 10th, the record was remitted

August 2d, and motion for rehearing made October 19th, all at the same term of court. The court refused to entertain the motion for a rehearing, and said:

"Having been properly remitted to the circuit court, the questions involved are no longer before us; and we know of no way to get the cases here again, unless possibly it should be done by consent of the parties by setting aside the *remittitur* and returning the record. When cases have been once decided here, and regularly remitted after the time to move for a rehearing has expired, the function of this court with respect to those cases is exhausted."

It will be observed that the remission of the record was at the end of about twenty-two days, and it is declared "the cases were regularly remitted to the circuit court." The principle declared in the opinion would have as much excluded jurisdiction on August 3d as on October 19th. The next of significance is *Hopkins v. Gilman,* 23 Wis. 512. The record was transmitted about forty-five days after the decision. The application, apparently at the same term, was to recall the record and to allow a motion for a rehearing or modification. The court said:

"The *remittitur,* then, has properly issued, and the record has been regularly sent down to the court below. This court has no longer any control over the cause. It has lost jurisdiction over it. The court below has become repossessed of the cause. It has been decided a number of times by this court that when a *remittitur* has regularly issued, and the record has been sent down to the court below, this court has lost jurisdiction over the cause."

In *Pringle v. Dunn,* 39 Wis. 435, it was first definitely reasoned that the statute requiring the remission of the record within thirty days took away the previously existing inherent jurisdiction of the court over its judgments throughout the remainder of the term. Of course, this conclusion could have been reached only on the theory that the presence of the record is essential to jurisdiction, for there were no words in that statute declaring that the court's power over its judg-

ments should not persist beyond the thirty days; that had to be inferred from the command that the record should not remain. In *Trowbridge v. Sickler,* 48 Wis. 424, 428, 4 N. W. 563, it was declared:

"After the *remittitur* has been regularly sent to the court below, and actually filed with the clerk of such court, the supreme court then loses jurisdiction of the cause, and the court below only has jurisdiction therein."

The decision in *Hocks v. Sprangers,* 113 Wis. 123, 89 N. W. 113, much relied on by respondent, suggests no distinction, as to the period of jurisdiction, between strict motions for rehearing and motions for modification of our judgments; it merely declares that our then rules refusing to receive the former after thirty days did not exclude the latter class of motions during the term of our jurisdiction. Other cases having some significance upon this subject are *Estey v. Sheckler,* 36 Wis. 434; *Pierce v. Kelly,* 39 Wis. 568; *Bonin v. G. B. & M. R. Co.* 43 Wis. 210; *Krall v. Lull,* 46 Wis. 643, 1 N. W. 217; *Williams v. Williams,* 55 Wis. 300, 12 N. W. 465, 13 N. W. 274; *Patten P. Co. v. G. B. & M. C. Co.* 93 Wis. 283, 66 N. W. 601, 67 N. W. 432; *Hocks v. Sprangers, supra; Ledebuhr v. Wis. T. Co.* 115 Wis. 214, 217, 91 N. W. 1012. A somewhat analogous question, arising upon application for change of venue between circuit courts, was discussed in *Servatius v. Pickel,* 30 Wis. 507, where it was in effect held that the court making an order for such change had jurisdiction to modify it so long as the record remained, but would lose its power as soon as the record had been transmitted to another circuit court so as to vest jurisdiction there.

In the light of these decisions of our own court we cannot avoid the conviction that the rule has been thoroughly adopted that, when the record upon an appeal has been regularly transmitted to and filed with the court from which it originally came, this court's jurisdiction over the cause, as also to

vacate or modify its own judgment, is at an end; that the effect of the statute is to impose upon the clerk the duty, as an officer of the law, to transmit the record at any time within sixty days after the decision of the court, subject, within that period, to such order as the court may make in protection of proper opportunity to make motions for rehearing, whether strictly such or of that nature; so that, whenever the clerk, without disobedience of any such order or rule of court, does, as in this case, transmit the record within the sixty days, it is regularly and lawfully transmitted and the jurisdiction of this court is terminated. It should perhaps be said, for certainty, that this limitation upon the power of the court to grant rehearing or to vacate or modify its judgment has no relation to that other power, existent in all courts and at all times, to correct the mere record of the judgments which they render so as to make the record properly express that judgment. *Hill v. Hoover,* 5 Wis. 386; *Will of Cole,* 52 Wis. 591, 9 N. W. 664. Neither do we mean to suggest that the mere physical presence of the record in this court can, after the expiration of the sixty days, continue the jurisdiction of this court, for such presence is unlawful, and the behest of the statute that it be remitted within the sixty days must be given full effect to terminate the jurisdiction at that time notwithstanding a disobedience thereof by the clerk. In such case, while the record may be here physically, it is not lawfully here. *Pringle v. Dunn,* 39 Wis. 435, 442. Nor do we suggest that any irregular or unlawful departure of the record from our files can have any effect. The unlawful or unauthorized act of the clerk in transmitting it would be as inefficient as his unauthorized act in retaining it. *Rowland v. Kreyenhagen,* 24 Cal. 52; *Vance v. Peña,* 36 Cal. 328.

We have not overlooked the position now apparently adopted in New York, that although all appellate jurisdiction of the cause is lost by the filing of the *remittitur* in the lower

court, and that court thereupon vested with complete jurisdiction, nevertheless the appellate court may recall the record and re-assume jurisdiction in order to review its former decision. Cardozo, Court of Appeals, § 133; *Franklin B. N. Co. v. Mackey,* 158 N. Y. 683, 51 N. E. 178. It is, however, antagonized by holdings elsewhere and by the declarations of this court in the cases cited, and we do not find reason to justify its adoption.

Having reached the conclusion that we have no jurisdiction over the cause and can make no order either with reference to our judgment or with reference to the record, it is not very material to discuss whether otherwise this motion could or would be received by the court in defiance of our present Rule 42:

"No motion as to any final determination made by the court, except a motion to correct mistakes in the record of this court, will be heard unless made within thirty days after such determination."

Counsel contend that this does not apply to a motion of this sort, and predicate such contention upon what was said in *Hocks v. Sprangers,* 113 Wis. 123, 89 N. W. 113, as to Rules XX and XXI of the old rules. Rule XX of the old rules, like Rule 37 of the rules of 1906, applied to a motion for a rehearing, strictly so called, while Rule XXI, in its terms, applied to *any* motion, and, as said in *Hocks v. Sprangers, supra,* at page 138 (89 N. W. 115), the practice has become reasonably well established that neither excluded a motion in the nature of a motion for a rehearing, as one to modify our judgment or mandate, at any time while our jurisdiction persists. It was in view of that anomaly that present Rule 42 was formulated. By its language it clearly includes the present motion to modify the final determination of this court, and the policy embodied in that rule is that all motions of that character, like motions for rehearing, must be made within the thirty days during which, in all cases, the records

are required to be retained. True, such rules do not take away our jurisdiction, but they limit and regulate the right of the litigant to invoke the exercise of such jurisdiction as we may have. *Att'y Gen. ex rel. Cushing v. Lum,* 2 Wis. 507, 510; *Baker v. State,* 84 Wis. 584, 54 N. W. 1003; *Deuster v. Milwaukee St. R. Co.* 89 Wis. 191, 194, 61 N. W. 766. True, the absolutism of Rule 42 is qualified by present Rule 21 reserving to the court the power in a proper case and for cause shown to enlarge the time within which any act may be done. We need not, however, and probably should not, in this case discuss the question whether respondent has shown proper cause for indulgence under that rule, since we have determined that we are wholly without jurisdiction to entertain his motion.

By the Court.—Motion to recall the record from the circuit court is denied, with $10 costs.

SIEBECKER and TIMLIN, JJ., dissent.

YAZDZEWSKI, Respondent, vs. BARKER and another, Appellants.

February 1—April 30, 1907.

Master and servant: Injury from unsafe appliance: General use: Instructions to jury.

1. The duty of an employer in respect to furnishing to his employee a reasonably safe place to work in or reasonably safe appliances to work with is not discharged if the place or appliance furnished is obviously dangerous although it is such as is in general use among employers of ordinary caution and prudence in the same line of business under the same circumstances.
2. The word "obviously," as used above, does not mean that the danger should be obvious to any person, however unskilled or

ignorant, but that it should be obvious to the ordinarily careful employer or to a person possessing equal skill and judgment and opportunity for examination.

3. An instruction to the effect that the machine in question was reasonably safe if such machines were in general use in the same business, unless the jury should find that such machines were not reasonably safe, was erroneous.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action to recover for personal injuries. It appeared upon the trial that the plaintiff on the 29th of July, 1902, was a common laborer about forty-one years of age and was employed by the defendants in their lumber mill at Ashland, where he had been continuously working since May 10th of the same year. His work was to take the lumber cut by a bandsaw on the east side of his position and also that cut by a resaw on the west side and place the same on certain live rollers which carried it some twenty feet to an open edger. When the lumber reached the edger it was taken by another employee called the edgerman and put through that machine. The edger was seven feet wide and had six circular saws set on a shaft or arbor, the two outside saws being stationary and the others being movable by means of a lever. The edger had no safety devices to prevent boards from being thrown back by the saws. It was claimed by the plaintiff that there were three devices which might have been used to prevent boards from being thrown back, viz.: (1) A spiked roller behind the saws with a press roll above; (2) a guard composed of long iron teeth or fingers fastened to a rod above the saws, which teeth or fingers rested lightly upon the boards behind the saw as they passed through at such an angle that if the board started back they would gouge into it and stop it; and (3) a press roller immediately in front of the saw resting firmly upon the board and preventing it from wabbling.

On the day first named a two-inch Norway pine plank ten

inches wide and eighteen feet long was being passed through the edger and was cut into two pieces, one four inches and the other six inches wide. The larger strip passed out in the usual manner, but the other was caught by one of the saws and was split in two, and both pieces were shot or thrown with great velocity backwards, one of them penetrating the plaintiff's body and inflicting very serious injuries. The following special verdict was returned by the jury:

"(1) Did *August Yazdzewski,* the plaintiff, receive injuries while in the employment of the defendants *Christopher C. Barker* and *Hiram C. Stewart* at the time and place alleged in plaintiff's complaint? *A.* (Answered by the court.) Yes. (2) Was the edger in defendants' sawmill at which plaintiff was employed when injured a reasonably safe machine as it was then operated by defendants? *A.* No. (3) Did the defendants fail to provide at the time plaintiff was injured any suitable swing press roll, teeth, fingers, spikes, or guards, as alleged in plaintiff's complaint, for the protection of their employees while at work on or about said edger? *A.* Yes. (4) If you answer question number 3 by 'yes,' could defendants, without impairing the usefulness of said edger, have provided an appliance to protect their employees while at work on or about said edger? *A.* Yes. (5) If you should find the defendants were guilty of a lack of ordinary care in failing to provide an edger with reasonably safe appliances for their employees while at work on or about the same, was said negligence of defendants the proximate cause of plaintiff's alleged injuries? *A.* Yes. (6) Was plaintiff guilty of any negligence which in any manner contributed towards his said injuries? *A.* No. (7) If from your answers to the foregoing questions the court is of the opinion that the plaintiff should have judgment herein, at what sum do you assess his damages? *A.* Five thousand dollars ($5,000)."

Judgment for the plaintiff was rendered on the verdict, and the defendants appeal.

For the appellants there was a brief by *Lamoreux & Shea,* and oral argument by *C. A. Lamoreux.*

For the respondent there was a brief by *Eaton & Eaton,* and oral argument by *M. H. Eaton.*

WINSLOW, J. It is strenuously contended by appellants that a verdict for the defendants should have been directed because (1) no negligence on the part of the defendants was shown; (2) it appeared that the injury resulted from the negligence of a co-employee; and (3) the plaintiff assumed the risk. In support of the first proposition it is said that the evidence conclusively showed that open edgers of the kind in question without guards were in general use in the lumber mills of northern Wisconsin, and hence that there can be no finding of negligence based on the failure to provide guards. While there was much evidence tending to show that such unguarded edgers were in general use in other mills, this is not a conclusive test upon the question of negligence, as we shall endeavor to demonstrate later in this opinion in discussing the alleged error in the instructions relating to the second question of the special verdict. As to the second and third propositions, we think it clear from the evidence that the court would not have been justified in directing a verdict for the defendants on either ground.

A far more serious question is raised, however, by the exceptions to the instructions given by the court with reference to the second question of the verdict. In submitting this question the court said:

"If you find from the evidence that open edgers and edging machines in which there were neither press rollers nor fingers nor any other appliance, device, or contrivance in front of the saws were in general use in the sawmills of northern Wisconsin at the time plaintiff sustained the injuries described in the complaint, you may answer question No. 2 'Yes,' *but if you find that such open edgers were not reasonably safe to the employees operating the same you will answer the question by 'No.'*"

The question submitted was whether the machine was reasonably safe, and the substance of the instruction was that if such machines were in general use then they were reasonably safe unless the jury concluded that they were not rea-

sonably safe; in other words, the fact of general use cut no figure in answering the question. In the last analysis the instruction says that the machine was not reasonably safe if you conclude that it was not, whatever be the fact as to the general use of such machines. We cannot approve this instruction. The rule of law undoubtedly is that when an employer furnishes to his employee a place to work in, or an appliance to work with, it is his duty to furnish a reasonably safe place or appliance. This duty is absolute and cannot be delegated. *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48. The general rule is also that if the employer furnish such a place or appliance as is in general use among employers of ordinary caution and prudence in the same line of business under the same circumstances, he has discharged the duty imposed on him. The place or appliance so furnished is in a legal sense "reasonably safe." *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671; *Prybilski v. N. W. C. R. Co.* 98 Wis. 413, 74 N. W. 117; *Sladky v. Marinette L. Co.* 107 Wis. 250, 83 N. W. 514. Many courts apply this rule without exception or limitation. 4 Thomp. Comm. on Neg. §§ 3991–3993; *Ship Bldg. Works v. Nuttall,* 119 Pa. St. 149, 13 Atl. 65. This court, while approving this general rule, has adopted a limitation thereon in consonance with what seems to us a more just and enlightened policy. That limitation is that the employer will not discharge his duty by furnishing the ordinary place or appliance, if such ordinary place or appliance be obviously dangerous. *Innes v. Milwaukee,* 96 Wis. 170, 70 N. W. 1064; *Boyce v. Wilbur L. Co.* 119 Wis. 642, 97 N. W. 563. The word "obviously" as here used does not apply to any person, however unskilled or ignorant, for in such case the employee would always assume the risk, and the exception would be no exception at all, but "obviously" to the ordinarily careful employer who is charged with the duty of furnishing the place or appliance, or "obviously" to a person possessing equal skill and judgment and opportunity for examination

as such an employer. Doubtless this was the limitation on the general rule which the trial judge had in mind when he added the last clause to the instruction quoted, but it is evident that the clause does not convey the idea, but rather eliminates the rule entirely.

A number of other rulings are complained of by the appellants, but we have found no prejudicial error save that above named. The claim that the question of the negligence of a co-employee, to wit, the edgerman, should have been submitted to the jury cannot be sustained. We find no evidence tending to show that the edgerman was guilty of any negligence. Apparently he was performing his duties in the usual manner. The verdict was undoubtedly unnecessarily long. The only material disputed questions were: (1) Whether the edger was a reasonably safe machine. (2) If not, was the failure to furnish a reasonably safe machine the proximate cause of the plaintiff's injury? (3) Was the plaintiff guilty of contributory negligence by way of assumption of the risk? (4) What damages has the plaintiff suffered?

By the Court.—Judgment reversed, and action remanded for a new trial.

KERWIN, J., dissents.

STATE EX REL. WILLIAMS, Appellant, vs. SAMUELSON, Respondent.

February 1—April 30, 1907.

Quo warranto: *Action by whom brought: Taxpayers: Refusal of attorney general to act: Constitutional law: Who are "county officers:" County supervisor of assessment: Construction of statutes: Qualifications for office: Official bonds: Local self-government: Assessment for taxation.*

1. Under sec. 3466, Stats. (1898), providing that an action of *quo warranto* may be brought in the name of the state by a private person on his own complaint when the attorney general refuses

to act or when the office usurped pertains to a county, etc., the person bringing the action must have some interest in ending the claimed usurpation, but it is sufficient that he be a taxpayer of the district affected.

2. The office of county supervisor of assessment, created by ch. 445, Laws of 1901, is an office which "pertains to a county," within the meaning of said sec. 3466.
3. The fact that in an action brought in the name of the state by a private person under sec. 3466, Stats. (1898), the attorney general appears and continues as one of the attorneys for the defendant sufficiently shows that an application to him to commence the action would have been futile, and is equivalent to a refusal by him to act in the matter on behalf of the state.
4. The county supervisor of assessment whose election by the county board for a term of three years is provided for by ch. 445, Laws of 1901, is not a county officer within the meaning of sec. 4, art. VI, Const., providing that "sheriffs, coroners, . . . and all other county officers except judicial officers shall be chosen by the electors of the respective counties once in every two years."
5. The term "all other county officers," incorporated into sec. 4, art. VI, Const., by amendment in 1882, means the heads of the several major divisions of county government existing at that time, and the section as amended does not take away the legislative power mentioned in sec. 9, art. XIII, to create other county offices with other duties and to provide for the manner of filling such offices and the terms thereof.
6. Obscurities in constitutional provisions are discoverable by the same process as are uncertainties in legislative enactments, and are to be dealt with in substantially the same way in determining the real intent of the lawmakers.
7. Where language used in a constitution may reasonably have more than one meaning, long, constant, and uniform legislative adoption of one of such meanings, not in violation of any existing judicial construction, may be taken as controlling.
8. As to offices created by the legislature and having peculiar duties incident thereto, the legislature may prescribe qualifications if they are reasonable and not opposed to constitutional provisions or the spirit of the constitution.
9. A requirement that, in order to be eligible to the office of county supervisor of assessment, a person must have been an elector and householder of the county not less than four years, is not unreasonable.
10. The legislature may provide, in respect to an office created by it, that the official bond of the officer shall be by a surety company and at public expense.

11. Ch. 445, Laws of 1901, which gives to a county supervisor of assessment supervision and direction of the work of the assessors in his county, but does not take out of the hands of an assessor the duties of his office or take away his right to exercise his discretion in valuing property, does not violate the right of local self-government. The whole duty of the supervisor, under said act, has reference to assisting the assessors, testing their work, seeing that the law is not violated, and in case of violations applying the proper remedy.

[12. Whether ch. 259, Laws of 1905, imposing new duties on the supervisor of assessment, violates the right of local self-government, not decided.]

APPEAL from an order of the circuit court for Clark county: E. W. HELMS, Judge. *Affirmed.*

Action of *quo warranto* involving the right of the defendant to hold and perform the duties of the office of county supervisor of assessment for Clark county, Wisconsin, under ch. 445, Laws of 1901.

The complaint by appropriate allegations shows that the defendant was, in form, duly elected by the county board of Clark county to the office in question November 18, 1904, for the term of three years, commencing on the first Monday of January, 1905; that he duly qualified according to the requirements of said ch. 445, and has since that time performed the prescribed duties of such office, and further alleges that there is no such office in fact; that his pretense in the matter is a usurpation because of the law, so called, aforesaid being unconstitutional and void.

The defendant by his attorneys demurred to the complaint, *first,* for want of jurisdiction of the person of the defendant or the subject of the action; *second,* for want of legal capacity to sue; and *third,* for insufficiency of facts to constitute a cause of action. The demurrer was sustained and plaintiff appealed.

George L. Jacques, attorney, and *R. J. MacBride,* of counsel, for the appellant.

The cause was submitted for the respondent on the brief of *L. M. Sturdevant* and *F. M. Jackson.*

MARSHALL, J. The questions whether the relator had legal capacity to commence and maintain the action and whether the facts alleged are sufficient to constitute a cause of action seem to be the ones relied upon to sustain the order complained of, so this opinion will be restrained accordingly.

The first question is ruled in favor of appellant by the statute, sec. 3466, Stats. (1898). It is there provided that an action may be brought against the party offending in the name of the state by a private person on his own complaint when the attorney general refuses to act, or when the office usurped pertains to a county and any person shall usurp, intrude into, or unlawfully hold any public office. True, in order for a private person to be competent to commence such an action he must have some interest in ending the claimed usurpation, but that is satisfied by his being a taxpayer of the district affected. *State ex rel. Kelleher v. Fordyce,* 115 Wis. 608, 92 N. W. 430. As suggested by appellant's counsel, the point under discussion was directly passed upon in that case. It was again passed upon very decisively in *State ex rel. Weinsheim v. Leischer,* 117 Wis. 475, 94 N. W. 299, this language being used:

"True, such private person, when not suing on behalf of the public, must have some interest in the question, more than that which is common to all members of the community; but that interest certainly appears when it is shown that he is a property owner and taxpayer in the village, and hence is necessarily pecuniarily affected. . . . We can entertain no doubt but that the action is properly brought by the private relators named in the complaint, under the express terms of the statute. It is still an action by the state, but the state has, by statute, permitted it to be prosecuted by private parties."

Whether the office here alleged to be usurped is strictly a county office or not, it quite clearly pertains to a county, within the meaning of the law. The name of the office is "county supervisor of assessment," and the duties incident

thereto are confined to and extend throughout the county. In the broad general sense of the term, the office is a county office.

Moreover, it appears that the attorney general was hostile to the maintenance of the action from the fact that he appeared therein as one of the attorneys for the respondent at the outset and continued as one of such attorneys down to the present time. That, as it has been held, shows that an application to him to commence the action would have been entirely futile, which is equivalent to a refusal to act in the matter on behalf of the state (*People ex rel. Ayres v. State Auditors,* 42 Mich. 422, 4 N. W. 274; *State ex rel. Lamb v. Cunningham,* 83 Wis. 90, 130, 53 N. W. 35), thus rendering operative that part of sec. 3466, Stats. (1898), aforesaid, making it competent for a private person to commence the action when the attorney general refuses to act. So there was legal capacity to commence and maintain the action both upon the ground of the attitude of the attorney general in the matter and the ground that the office pertained to a county.

The first question in order respecting whether the law is valid is, Does the feature which provides that the supervisor of assessment for each county shall be elected by its board of supervisors and for a term of three years, violate sec. 4, art. VI, of the constitution, providing that "sheriffs, coroners, registers of deeds, district attorneys, and all other county officers except judicial officers, shall be chosen by the electors of the respective counties once in every two years?" In short, is the so-called office of county supervisor of assessment a county office within the meaning of the language "all other county officers" as used in the quoted words? If so, manifestly, the legislature acted outside the scope of its authority in providing for filling the office otherwise than by an election by the people.

Conceding for the purposes of the discussion that in the broad, most comprehensive meaning of the term "county offi-

cers" a county supervisor of assessment would be included therein, the ultimate question is whether the language is to be taken in that sense or in a restricted sense excluding such officers.

While the language of a law, whether fundamental or a legislative creation, which is plain, looking at its literal sense, ordinarily, in such sense, is to be regarded as expressing the intent of the lawmakers, that sense may be viewed broadly or restrictively, or even violated, within the limits that the reasonable meaning of words cannot be departed from, in case of their being ambiguous and such departure being necessary in order to render efficient the purpose of the lawmakers. This subject has been many times discussed in our decisions. The law in respect to the matter was declared in *Rice v. Ashland Co.* 108 Wis. 189, 192, 84 N. W. 189, 190, thus:

"There must be some uncertainty of sense, else the natural and ordinary meaning of the words must prevail. When there is no such uncertainty, to resort to judicial construction to extend or restrict the meaning of words and give to a legislative enactment a character other than that which its language plainly indicates, it is said, 'would be extremely dangerous, for there would be no law, however definite and precise in its nature, which might not thereby be rendered useless.' . . . But courts are obliged in many cases to go further. . . . It is always presumed, in regard to a statute, that no absurd or unreasonable result was intended by the legislature. Hence if, viewing a statute from the standpoint of the literal sense of its language, it is unreasonable or absurd, an obscurity of meaning exists, calling for judicial construction. . . . While courts do not, and cannot properly, bend words out of their reasonable meaning to effect a legislative purpose, they do give to words a liberal or strict interpretation within the bounds of reason, sacrificing literal sense and rejecting every interpretation not in harmony with the evident intent of the lawmakers rather than that such intent shall fail."

So before attempting to read the provision of the constitution in question other than in the plain literal sense thereof,

we must reach the conclusion that ambiguity exists, when we view it according to established principles.

The language of a law is not necessarily free from ambiguity merely because looking thereto alone no uncertainty of meaning appears. Ambiguity, as has often been said, may as well spring from the effect that would result by applying a law in its literal sense, as from obscurity of expression in the words themselves. This subject was thus treated in *Rossmiller v. State,* 114 Wis. 169, 178, 89 N. W. 839, 841:

"It is fundamental that if, giving to the words of an act their literal or natural meaning, the conclusion reached would be unreasonable or absurd, some other meaning within the reasonable scope of the words may be adopted to avoid that result, if it appears that such meaning may probably have been the one intended."

One of the familiar principles to be applied in determining whether words of a law which are plain on their face are ambiguous nevertheless, is that it must always be presumed that the lawmakers did not intend anything clearly unreasonable or absurd. Another familiar principle is that implied repeals are not favored. Therefore, where a later enactment in its ordinary sense nullifies an earlier one to which, however, it makes no reference, ambiguity exists calling for judicial construction to the end that a meaning may be attributed to the later law, if the lawmakers so intended, which will give effect thereto without disturbing the earlier enactment. The rule on that subject has often been declared here. It was stated in *Mason v. Ashland,* 98 Wis. 540, 545, 74 N. W. 357, 359, thus:

"In judicial construction, one of the most familiar rules is that conflicts by implication or otherwise, between different provisions of a statute, or between two statutes, are not favored and will not be held to exist if they may be otherwise reasonably construed. . . . When two acts or provisions are susceptible of a construction which will give operation to both and all of the words in each, without doing violence to either,

it is incumbent on the court to search for some reasonable ground for such construction and not reach the conclusion that a fatal conflict exists, unless the meaning of the words and the manner of their use be such as to render it impossible to reconcile them on any reasonable theory, whereby all may be given force and effect."

Applying the foregoing to the situation in hand it seems that we must go further, before condemning the law in question as invalid, than merely to determine that looking at the literal sense of sec. 4, art. VI, of the constitution it includes all officers who are in any sense "county officers." It would be an extraordinary restriction upon legislative power to so tie its hands as to disable it from creating any sort of an office, however insignificant, pertaining to a county to be filled otherwise than by an election by the people. Practical construction by the uniform course of legislation since the constitution was amended into its present form condemns the idea that so drastic a restriction was intended. There is the law providing for county commissioners of equalization, sec. 1077*a*, Stats. (1898). Such officers have been held not to be county officers in a constitutional sense. *State ex rel. Brown Co. v. Myers*, 52 Wis. 628, 632, 9 N. W. 777, 778. The court there did not regard the term "county officers" as used in the constitution to necessarily include every officer whose duty pertains to a county. This language was used:

"It is, doubtless, the meaning and intent of the constitution, that certain officers shall be elected or appointed by the people of the district to which their offices appertain. But we do not think the commissioners appointed under this act are 'officers' within the meaning of the constitution. They are merely appointed to do a specific act, and when that act is performed their power ceases."

Then there is the law providing for county game wardens (sec. 2, ch. 312, Laws of 1899). They are required to be authorized by the county board and to be appointed in a particular manner, their compensation to be fixed by the county

board and paid out of the county treasury as other county officers are paid. Such officials have been held elsewhere to be county officers within the broad meaning of the term. *State ex rel. Armstrong v. Halliday,* 61 Ohio St. 171, 55 N. E. 175. Again we have superintendents of the poor, who are required to give bonds like other county officers, sec. 1520, Stats. (1898), and the law providing for trustees to manage the charitable county institutions in the county of Milwaukee (ch. 94, Laws of 1905). There are others, but enough have been referred to for the purposes of the discussion. All mentioned are as distinctively, it would seem, county officers as are county supervisors of assessment. So if the language of the constitution in question is so restrictive on legislative power as to include all county officers falling within the full scope of the term in question, the whole course of legislation for a quarter of a century has been wrong and we have many county officers, so called, who have no legitimate basis for the authority they assume to exercise.

Again if sec. 4, art. VI, includes every officer who may in any sense be regarded as a county officer, it is plainly repugnant to the spirit, and in our judgment to the letter, of sec. 9, art. XIII, of the constitution, which provides that "all county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct." That contemplates the existence of county officers whose election is provided for by the fundamental law and others to be elected or appointed as the legislature shall provide.

It is an inefficient answer to the foregoing indications of ambiguity to say that the term "all other county officers" does not admit of any other reasonable construction than the one including all officers however insignificant whose duties appertain to a county at large. The term obviously has a broad general and a narrow or particular meaning, and the sense in-

tended must be determined with reference to the particular case. There are heads of major divisions of state and county government which are commonly known as state and county officers, and, generally speaking, when those terms are used one associates the same with some such head.

In *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 107 N. W. 506, a similar question was involved. Ch. 366, Laws of 1905, provides that the place of trial of all actions authorized to be brought against any of the state officers in their official capacities shall be in Dane county. The court upon due consideration held that the term "state officers" may be construed as meaning only heads of the executive departments of the state elected by the people at large, such as governor, lieutenant-governor, state treasurer, secretary of state, attorney general, and the like, that being its particular meaning, or given its more comprehensive sense including every person whose duties appertain to the state at large, according to the legislative intention; that the exact sense in which the term is used in any particular law must often be determined by ordinary rules for judicial construction. Applying the rule that effects and consequences are to be regarded in construing a law where the words thereof will admit of either of two reasonable meanings, the court held that in the law in question the words "any of the state officers" should be restrained to heads of departments having their official residence at the state capitol, and expected to keep open office there during business hours and, generally speaking, to be there themselves; that is, that the term was used by the lawmakers in its narrow and particular instead of its broad and general sense.

In harmony with the foregoing we find it to have been held by the supreme court of the United States that the term "county officer," strictly speaking, "is one by whom the county performs its usual political functions; its functions of government." One who "exercises continuously, and as a

part of the regular and permanent administration of government, its public powers, trusts, or duties." *Sheboygan Co. v. Parker,* 3 Wall. 93. In this connection several cases in the books where the term "county officers" has been construed might be discussed, but to do so would throw no satisfactory light on the question we have to decide, since the conditions here are different from those referred to in such cases. The following are a few of them: *Foushee v. Christian,* 119 N. C. 159, 25 S. E. 793; *Laird v. Leap,* 42 Neb. 834, 60 N. W. 1043; *State ex rel. v. Brennan,* 49 Ohio St. 33, 29 N. E. 593; *State ex rel. Armstrong v. Halliday,* 61 Ohio St. 171, 55 N. E. 175; *State v. Tilford,* 1 Nev. 240; *Hutchinson v. Ashburn,* 5 Neb. 402; *State ex rel. Holmes v. Dillon,* 90 Mo. 229, 2 S. W. 417.

In determining whether the words "all other county officers" were used in the constitution in their particular sense, the affirmative is suggested at once by the rule of *noscitur a sociis.* Several but not all of the principal heads of county government required to have their offices at the county seats and ordinarily in the building provided for that purpose are mentioned, followed by the term "all other county officers except judicial officers." In that we have a very strong indication that minor officials not usually thought of when the term "county officers" is used were not intended to be included, but only sheriffs, coroners, registers of deeds, and the like. Such indication is emphasized, as we shall see, with striking significance by the conditions existing at the time of the formation of the constitution and at the time sec. 4, art. VI, was amended into its present form, and the way the subject has always been treated by the legislature as we have heretofore seen.

It may be thought that the rules for the construction of legislative enactments do not apply to the construction of the fundamental law, and that the argument thus far on that account is somewhat beside the case. The authorities, however,

are otherwise, being to the effect that obscurities in constitutional provisions are discoverable by the same process as are uncertainties in legislative enactments, and are to be dealt with in substantially the same way in determining the real intent of the lawmakers. Potter's Dwarris, Stat. & Const. 654, 655; Story, Const. (5th ed.) §§ 397–404.

At the time of the adoption of the constitution there was a county system of government with the ordinary principal heads, such as sheriffs, coroners, district attorneys, county treasurers, county surveyors, registers of deeds, county commissioners, and clerks of such commissioners, who performed substantially the duties now performed by county clerks. The constitution was adopted largely with reference to that situation. In discussing a somewhat similar situation in New York, it was said that the constitution should be deemed to have been prepared and adopted in reference to existing laws upon the provisions of which in detail it depended to be set in operation. *Rathbone v. Wirth,* 150 N. Y. 459, 473, 45 N. E. 15; *People v. Raymond,* 37 N. Y. 428.

Now we find that the framers of the constitution, dealing with the existing conditions and contemplating the continuation of its general features, provided that certain of the existing heads of county governments should be elected by the people, viz., sheriffs, coroners, registers of deeds, and district attorneys, leaving the other heads to be provided for, as well as minor county officers, in such way as the legislature might provide, and in respect thereto sec. 9, art. XIII, which has never been changed, was adopted to cover the subject in the words heretofore quoted, viz.:

"All county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct."

And contemplating that the legislature might from time to time create new county officers with duties different from

those theretofore performed by such officers, it was provided in said sec. 9 that:

"All officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct."

Following the constitutional plan in the first revision of the statutes a chapter was devoted to the subject of counties and county officers. That included members of the county board of supervisors, taking the place of the old commissioner system, and made up of the chairmen of the boards of supervisors of the several towns and the supervisors in cities as county officers; also the clerk of the board of supervisors, the clerk of the circuit court, district attorney, judges of probate, court commissioners, sheriffs, coroners, county treasurers, registers of deeds, and county surveyors. Ch. 10, R. S. 1849. That system was continued in the revision of 1858, ch. 13, and again continued in the revision of 1878, the subject of county officers being treated under ch. 37, the same being extended to include superintendent of schools, and all being made elective by the people. Later, in 1882, sec. 4, art. VI, of the constitution was amended so as to conform thereto by adding after the words "district attorneys" the words "and all other county officers except judicial officers," thus including county clerks and superintendents of schools, leaving sec. 9, art. XIII, as before, referring to certain county officers whose election was provided for in the constitution, pointing quite plainly to sec. 4, art. VI, and other county officers whose election was not provided for, they to be elected by the electors of the respective counties or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct, and leaving the legislature free to create other officers to be "elected by the people or appointed, as the legislature may direct." It seems quite plain that sec. 4, art. VI, from the beginning dealt with county officers in the restrictive sense,—the recognized heads of the several divisions of county government as treated in the

statutes from the beginning under the head of county officers, and that sec. 9 in the opening lines refers to such county officers and in the closing lines to such other county officers as the legislature might from time to time create, reserving to it authority to provide for filling the offices either dy election or appointment.

As argued by respondent's attorneys, the constitutional provision in New York identical with our sec. 9, art. XIII, was early held to use the term "county officers" with reference to officers thus known at the time of the adoption of the constitution, and that the right was reserved to create additional county offices with duties different from those of the officers specially mentioned, and to provide for filling them. *People ex rel. Wood v. Draper,* 15 N. Y. 532, 538; *People ex rel. Loew v. Batchelor,* 22 N. Y. 128, 140; *People ex rel. Brown v. Woodruff,* 32 N. Y. 355, 364; *People v. Raymond,* 37 N. Y. 428; *Matter of Brenner,* 170 N. Y. 185, 190, 63 N. E. 133; *Allison v. Welde,* 172 N. Y. 421, 65 N. E. 263. Those cases and others that might be referred to are to the effect that the legislature under such a constitutional system as ours, so far as indicated by sec. 9, art. XIII, aforesaid, is free to create a new county office and provide for filling it by some authority other than direct action by the electors, so long as the duties of the office are not such as were incident to some county office at the time of the formation of the constitution.

Without further discussion we are constrained to hold that the term "all other county officers" was used in the instance in question in harmony with the statutory division of officers into state, county, and town officers existing at the time of its incorporation into the fundamental law. In other words, in its particular sense—that of heads of the several major divisions of county government as then understood,—and without any thought of surrendering the legislative power mentioned in sec. 9, art. XIII, to create other county offices with duties other than those incident to those offices grouped

under the special statutory treatment of the subject, and to provide for the manner of filling such offices, not of course invading the constitutional system of local self-government. That, as we have seen, is supported by the fact that such interpretation of the words is within their reasonable scope, and is necessary to avoid implied repeal of a most important provision of the constitution. It is supported by the rule that surrender by the people of a commonly exercised legislative power to create new offices and provide for filling the same should not rest on any less certain basis than plain unmistakable language. It is supported by the rule of *noscitur a sociis.* It is supported by the doctrine that the term "county officer" as used in the constitution refers only to such county officers, or the duties incident thereto, as existed at the time of the adoption of the constitution. It is further supported by practical construction, as indicated by numerous legislative enactments creating new county offices, in the broad sense of the term, and providing for filling the same otherwise than by the electors of the counties; the history in that regard extending over a period of more than a quarter of a century.

The last phase of the case mentioned we deem of special importance, since there are many important laws which might otherwise be fatally affected. True, practical construction is of no consequence where the language of the law will reasonably permit of but one meaning, but where it is otherwise, as we find to be the case here, and the legislature has consistently, and not in violation of any existing judicial construction, adopted a particular meaning reasonably attributable to the law, as shown by the general course of legislation covering a long period of time, such circumstance may well be taken as controlling. *Mayor v. State ex rel. Board of Police,* 15 Md. 376. In that case it was held that a provision of a constitution may receive interpretation from long,

constant, and uniform legislative practice. The opinion is thus epitomized in the syllabus:

"Such legislation is evidence of contemporaneous acquiescence of the people, and the various departments, in this practical interpretation, and the constitution may receive an interpretation from a long, constant, and uniform legislative practice."

To that effect are *McCulloch v. Maryland,* 4 Wheat. 316, and numerous cases cited in the note to § 476, 2 Lewis's Sutherland, Stat. Constr. (2d ed.), where the same is stated as established doctrine.

It is next argued that ch. 445, Laws of 1901, is void as arbitrary class legislation, in that it violates the letter and spirit of the constitution in providing that the term of the office created shall be three years, whereas the term for county officers generally is two years, and it provides special and unreasonable qualifications, in that a person to be eligible to the office is required to be an elector and householder of the county not less than four years before the date of his election, and is required to furnish a bond to the state of Wisconsin signed by an authorized surety company conditioned for the faithful and impartial discharge of his duties.

The suggestion that the three-year term of office contravenes the constitution as to the term of office of county officers is answered by what has been said, in that supervisors of assessment are not constitutional officers in the sense that they are specially mentioned with a special restriction as to their election and term of office.

There is not in our constitution any general provision respecting eligibility to public office. We do not find any authority, in the numerous cases cited, to the effect that there is any implied limitation upon the right of the legislature to prescribe reasonable qualifications for public offices, not contravening any constitutional provision on the subject. Especially is that true where the office itself was not in existence

at the time of the adoption of the constitution, but is a mere legislative creation under the reservation of authority in that regard. It is useless to examine the numerous cases cited to our attention. Many of them have reference to provisions not found in our constitution. A good illustration is *State ex rel. Holt v. Denny,* 118 Ind. 449, 21 N. E. 274, where a requirement of five years' residence for eligibility to public office was condemned because of a special provision which we do not have. In Throop, Public Officers, at § 73, it is stated as a general rule that the legislature has full power to prescribe qualifications for public office in addition to those prescribed by the constitution, if any, provided that they are reasonable and not opposed to the constitutional provisions or to the spirit of the constitution. That certainly must be true as to offices created by the legislature having incident thereto peculiar duties.

The requirement in the law in question that a candidate to be eligible shall be an elector and householder of the county for not less than four years seems reasonable and very moderate. A supervisor of assessment in order to be fairly equipped for his duties must needs have some familiarity with the county in which his duties are to be performed. The requirements prescribed by the law seem to be about as moderate a guaranty that he shall have such familiarity as legislative wisdom could well have devised. The substantial part of such requirements seems to be actual identification of the candidate with the people and interests of the county for a period of four years, at least, by his having been an elector and householder therein during that period.

Our attention is called to *State ex rel. v. Robbins,* 71 Ohio St. 273, 73 N. E. 470, holding that a law requiring official bonds to be obtained of surety companies is unconstitutional as a restriction upon the liberty to contract. The case is quite novel and seems to stand alone, and to rest upon reasoning which we are not willing to follow. It is not suggested that

such a law violates any express provision of the constitution, but rather that it violates the spirit thereof as contained in some general declarations referred to. It is not perceived why it is not within the scope of legislative authority, especially in regard to an office created by the legislature, to provide that the official bond of the officer elected or appointed to fill the office shall be by a surety company and at public expense.

Is ch. 445 a usurpation, in that it violates the right of local self-government, taking from the various primary taxing districts of the county the right to have the subjects of direct taxation assessed therefor by officers of their own choosing? That is the next question to be solved. Counsel for appellant maintain the affirmative, because sec. 4 provides that the county supervisor of assessment shall have full and complete supervision and direction of the work of the assessors in his county. However, when we come to examine the precise nature of the supervision referred to we find that it does not take from the local assessors to any extent their discretion in respect to valuing property for taxation. The supervisor is required, as it seems, to assist and advise the local assessors and see that they obey the law. After the supervisor has exhausted his authority it is for the local assessor in every case, or the board of review, to exercise discretion as to valuing the property. The supervisor's work consists wholly, as it seems, in seeing that the assessor performs his duty, not in performing the assessor's duty for him. Sec. 4 provides that the supervisor shall annually call the assessors together for conference and instruction relative to their duties. Sec. 5 requires him to examine public books, records, and papers in his county for the purpose of obtaining knowledge respecting property assessable in the assessment districts of his county. Sec. 6 requires him to test the work of assessors during the progress of their work, and provides that if he shall ascertain that any property has been omitted or not assessed ac-

cording to law he shall bring the same to the attention of the assessor of the proper district, and if he then neglects or refuses to correct the assessment that the supervisor shall report the same in a prescribed manner to the board of review for its action. Sec. 7 provides for the supervisor making complaint to the presiding judge for the removal of an assessor whom he believes to be guilty of a violation of law. Sec. 8 requires the supervisor to make a report in detail of his work to the county board. Sec. 9 provides that, for the purpose of testing the accuracy of the assessment made in any district for any year and to secure information for use in equalizing values between taxing districts, an assessment may be made in such assessment district for the same year by the supervisor of assessment and reported to the county board. Sec. 10 provides that the supervisors of assessment shall be under the supervision and direction of the state tax commission. Thus it will be seen that the supervision of the local assessors contemplated by the act does not extend in any respect to taking out of the hands of an assessor the duties of his office as they have always existed, to assess all the property in his district subject to taxation according to his judgment and in accordance with the directions contained in the statutes. The whole duty of the supervisor has reference to lending him assistance, to testing his work, to seeing that the law is not being violated, and in case of violations to applying the proper remedy.

Ch. 259, Laws of 1905, was referred to on the argument as having some bearing on the question here involved, but it is considered that it does not. This action challenges the existence of the office of supervisor of assessment under the act of 1901, purporting to create it, and challenges the right of the respondent to hold and perform the functions of such an office. The act of 1905 is an independent provision imposing new duties on the supervisor of assessment. Whether the performance of such duties would violate the right of local

self-government is not involved in the questions raised as to the validity of the act of 1901. The general result of the foregoing is that the order appealed from is right and must be affirmed.

By the Court.—So ordered.

DODGE, J., dissents.

REDDINGTON, Respondent, vs. FRANEY, imp., Appellant.

March 22—April 9, 1907.

Subrogation: Payment of debts of another: Partnership: Pleading: Parties.

1. Relief by way of subrogation in favor of one who has paid the debt of another should not be granted unless the necessity for it be clearly shown.
2. Plaintiff bought the interest of one partner and with the other formed a new firm. He advanced money for the purpose of discounting bills of the new firm, but his partner secretly used it to pay the debts of the old firm. *Held*, that the new firm was the owner of the money so used, and plaintiff's right, if any, must be worked out by subrogation of the new firm to the rights of the creditors whose claims were so paid, rather than by subrogation of the plaintiff personally.
3. A complaint in such case which did not show the relations and rights of the partners in either firm as between themselves, or that, even if the new firm was largely indebted to plaintiff, he could not secure repayment of his advances by dissolution and settlement of its affairs, did not state a cause of action for subrogation.
4. The partner who was a member of both firms, and who was made a defendant in the action, was not a necessary party plaintiff; nor was it essential that the creditors of the old firm, whose claims had been paid, should be joined as defendants.

APPEAL from an order of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

The complaint in this case alleged in brief the following facts: That on and prior to June 30, 1902, the defendants *John Franey* and Thomas F. Franey were partners under the name of T. F. Franey & Co., owning a stock of goods and conducting a furniture business at Plymouth, Wisconsin, of which business Thomas F. Franey was the managing partner; that on the day named the plaintiff purchased the interest of *John Franey* in the business on the representation that said business was profitable and owed no debts, and upon the further express agreement in writing on the part of *John Franey* that he would pay all debts of the former firm if any there were; that plaintiff was thereupon received into the firm, and that in truth the former firm was then owing debts amounting to $3,721.95; that thereafter the plaintiff advanced to the new firm the sum of $4,000 on the representation of Thomas F. Franey, the managing partner, that it would be used to discount the bills of the new firm; that without the plaintiff's knowledge or consent said Thomas F. Franey used $3,721.95 out of said sum in discharging the debts of the old firm, a list of said debts so paid being given; that Thomas F. Franey was, at the time plaintiff discovered said misapplication of funds, and now is, wholly insolvent, possessing no money or property out of which plaintiff could then or can now realize any part of said moneys; that the plaintiff by reason of the premises became the equitable owner of said claims so paid and is entitled to be subrogated in place of the creditors so paid. Judgment of subrogation and that the plaintiff recover the sums so paid against Thomas F. Franey and *John Franey* was demanded.

The defendant *John Franey* demurred to the complaint on three grounds: (1) That there is a defect of parties plaintiff in that Thomas F. Franey should have been joined as a plaintiff; (2) that there is a defect of parties defendant in that the creditors whose claims were paid should have been joined as defendants; (3) that the complaint does not state

facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant *John Franey* appeals.

For the appellant there was a brief by *Doyle & Hardgrove,* and oral argument by *J. G. Hardgrove.*

Simon Gillen, for the respondent.

WINSLOW, J. The essential facts alleged in the complaint are that the plaintiff advanced to his firm, for the purpose of making cash purchases of goods, money which his partner T. F. Franey secretly and without plaintiff's consent used to pay debts of the former firm composed of T. F. and *John Franey,* and that T. F. Franey has no property out of which plaintiff can collect his claim. These are the facts from which the plaintiff's right to subrogation must be found to exist, if it exist at all. It is true that it is alleged with much particularity that *John Franey* contracted in writing with the plaintiff to pay and discharge the debts of the old firm at the time plaintiff purchased *John Franey's* interest and was received into the firm; but no liability is now claimed as a result of that agreement, and, indeed, this court has already decided in a former action between the plaintiff and *John Franey* that there could be no recovery on the agreement in the absence of allegations showing that the plaintiff was in some way legally compelled to pay the debts of the old firm. *Reddington v. Franey,* 124 Wis. 590, 102 N. W. 1065. It will be noticed that no statement is made as to the present pecuniary condition of the new firm or the amount of its property; and we are entirely uninformed as to whether it is still doing business or has been dissolved, whether the partners have settled their mutual accounts or not, whether the plaintiff owes the firm or the defendant T. F. Franey owes the firm, or whether both owe the firm, or what will be the condition of the mutual accounts when the business is settled and a balance struck. The significance of these omissions will appear later in this opinion.

The doctrine of subrogation, by means of which a debt once paid or a security discharged is kept alive as against the principal debtor for the benefit of a third person who, not being a mere volunteer, has paid the debt, is an equitable doctrine, favored by the law because it accomplishes the ends of justice and fair dealing. It is well settled that one who is legally bound to pay the debt or who has an interest to protect thereby is not a volunteer. It is also held without substantial conflict of opinion that where a fund is misappropriated by an agent or trustee without the owner's consent to the payment of the debt of another, the owner of the fund is not a volunteer, but will be entitled to subrogation if necessary for his due protection. It will be unnecessary to enlarge further on the abstract doctrine of subrogation in the present case. The right must be founded, if it exist at all, upon one or both of these principles. It is evident that the plaintiff was under no obligation to pay the debts of the old firm, nor was such payment necessary for the protection of any property interest which he had. Neither his individual property nor the property of the new firm could have been seized to pay them. *Reddington v. Franey, supra.* He had, however, advanced funds to the new firm on the agreement that they should be used to discount bills for the purchase of new goods, and according to the allegations of the complaint these funds were used by his partner surreptitiously to pay the bills of the old firm. Independently of any agreement as to the use of the funds, his copartner would have no right to use them for purposes outside of the firm business; hence the allegation that it was understood that they were to be used to discount bills of the new firm adds nothing to the legal effect of the transaction. The money was advanced to the new firm for its proper purposes; thereby the firm and not his copartner became indebted to the plaintiff for the amount advanced, and the moneys became firm assets, and the plaintiff became entitled to credit for the advance upon the firm books. The

plaintiff could not sue his copartner at law to recover the advances in the absence of an agreement by his copartner that he would personally pay them. *Sprout v. Crowley,* 30 Wis. 187; *George v. Benjamin,* 100 Wis. 622, 76 N. W. 619. The logical conclusion seems to be that T. F. Franey took firm funds without the knowledge of his partner and wrongfully used them in discharging the debts of the old firm of which he was a member. Certainly this act calls persuasively for the application of the doctrine of subrogation on behalf of the owner of the funds, if necessary for such owner's protection. As we have seen, the firm owned the funds, and hence the plaintiff's right, if any, must be worked out by subrogation of the new firm rather than by subrogation of the plaintiff personally. In legal contemplation it is the new firm which advanced the money to pay the debts of the old firm, not the plaintiff, as the complaint seems to assume.

Here we meet difficulties arising from the lack of any allegation as to the relations and rights of the partners in either firm as between themselves. T. F. Franey was a partner in both firms and *prima facie* liable for the debts of both firms. There is no allegation that *John Franey* ever agreed with T. F. Franey to assume or pay the debts of the old firm, nor is there any showing of the condition of the accounts of that firm as between the partners. For all that appears T. F. Franey may have been equitably bound, as between himself and *John,* to discharge those debts, or he may have agreed to do so at the time of the sale of *John's* interest to the plaintiff. In either case T. F. Franey would have no right of subrogation either individually or through the medium of the new firm. But this fact would not, of course, affect the right of the plaintiff to have his equities worked out through the firm. Here, however, we meet another difficulty. The plaintiff's advance of money to the new firm simply made him a creditor of the firm. His copartner may have advanced a greater sum, or the plaintiff may have drawn out moneys, or both,

so that at the time of the commencement of this action the plaintiff may have been indebted to the firm so that upon the closing out of its business he would have no interest in its assets. But even if the new firm be largely indebted to the plaintiff, still we have no information as to the financial condition of the firm. For all that appears in the complaint it may have a large amount of property. Its condition may be such that after payment of its debts and crediting the plaintiff with his advances and charging them to the defendant T. F. Franey there will be a balance remaining for division between the partners. The allegation that the defendant T. F. Franey is personally insolvent so that a judgment against him cannot be collected can hardly be considered as an allegation that the firm has no property with which to meet its obligations. If the plaintiff can secure the repayment of his advances by dissolution and settlement of the affairs of the firm there is no need of invoking the principle of subrogation.

The doctrine of subrogation, by which a debt once paid or a security released is allowed to be revived and enforced in another's name, is an equitable doctrine, designed to prevent imminent injustice, and is only carried out in the exercise of equitable discretion. It has been called a doctrine of mere equity and benevolence. It is invoked for the protection of the person who, not being a volunteer, has paid the debt. While it will not be denied simply because the creditor may have another possible remedy, it must certainly appear that it is necessary for his protection. For all that appears in the present complaint the plaintiff (who is the only one claiming subrogation here) may be now the debtor of the new firm, or, if a creditor, he may have in his own hands the property of the new firm which may be ample to satisfy his claim. As said in *Edinburg Am. L. M. Co. v. Latham,* 88 Ind. 88: "We think it clear that such relief [*i. e.* subrogation] ought not to be granted unless the necessity for it be distinctly shown." The fundamental basis of the privilege being the necessity

of protecting the man whose money has discharged the debt, this requirement seems to be reasonable as well as self-evident.

We do not discover that there is any defect of parties, either plaintiff or defendant; but for the reasons given the demurrer should have been sustained.

By the Court.—Order reversed, and action remanded with directions to sustain the demurrer to the complaint.

SCHAMPER, Respondent, vs. ULLRICH, Appellant.

March 25—April 30, 1907.

Vendor and purchaser of land: Pleading: Election between causes of action: Continuance: Absence of party: New trial: Discretion.

1. **Under a complaint alleging fraud in a sale of land by defendant to plaintiff and also a subsequent agreement between the parties by which defendant took an option upon the land and was to pay plaintiff all that he got for it in excess of a certain sum and also agreed to return the amount paid by plaintiff on the purchase price, there was no error in allowing plaintiff to elect upon the trial to proceed upon the theory of a contract to pay the sums mentioned.**
2. **Refusal to continue a cause over the term because of the alleged sudden illness of defendant, and refusal thereafter to grant a new trial on the same ground, are *held*, upon the showing made by affidavits upon both sides, not to have been an abuse of discretion.**

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This action was commenced December 11, 1905, to recover damages sustained by alleged false representations in a land deal between the parties, and also by a failure of the defendant to perform an alleged oral contract in respect to the deal. The lands were situated near Grand Rapids and Nekoosa in Wood county. The complaint is unique, and to the effect

that prior to April 1, 1905, both parties resided in Chicago; that the defendant had several valuable farms for sale near Grand Rapids, which he falsely represented to contain 15,000 inhabitants, whereas it only contained 6,000 inhabitants, and near Nekoosa, falsely represented to contain 2,500 inhabitants, whereas it only contained 1,000 inhabitants; that the defendant falsely and fraudulently represented the qualities of said farms as to fertility, timber, and buildings; that, relying upon such representations, the plaintiff selected one of said farms of 160 acres, a description of which the plaintiff could not give by reason of being a stranger in Wood county; that the plaintiff purchased said farm of the defendant for $1,200, but entered into no written contract therefor, signed no note or memorandum thereof, and took no possession thereof; that in payment therefor the plaintiff gave the defendant a mortgage on real estate he owned in Chicago, which mortgage the defendant immediately sold to an innocent party to defraud the plaintiff; that out of said sum the plaintiff received from the defendant $600 in personal property, and the balance of $600 was to apply on the purchase price of said farm; that the plaintiff shipped his household goods from Chicago to Nekoosa, which the defendant fraudulently and with intent to deceive removed to a different and much inferior farm several miles south of Nekoosa; that on complaint being made by the plaintiff the defendant took from him an option on the farm so selected and purchased by the plaintiff, and agreed to give to the plaintiff all he got for the land over and above $1,350, and to return to the plaintiff the $600 he so received on the mortgage given to him by the plaintiff on his real estate in Chicago; that thereafter the defendant sold the 160-acre farm so selected by the plaintiff for $1,500, but that the defendant refused to give to the plaintiff the $150 as so agreed and refused to repay to the plaintiff the $600 so fraudulently taken from the plaintiff.

The defendant answered and denied all false representa-

tions and all fraud and deceit, or that the plaintiff relied upon any such representation or statement, and admits or alleges that the defendant had farms for sale in Wood county; that the plaintiff claimed to be a good judge of farm lands; that he went to Nekoosa and looked over the several farms of the defendant before making any choice or purchase, and that the plaintiff made such selection and purchase after a full investigation and solely upon his own judgment; that the farm so selected had no buildings thereon and was so purchased for $1,200; that the plaintiff and defendant entered into a written contract and agreement for the farm described April 5, 1905; that at the time the plaintiff gave to the defendant a mortgage of $1,200 on the real estate owned by him in Chicago, which, pursuant to an understanding with the plaintiff, the defendant sold, and from the proceeds thereof he was to pay and did pay to the plaintiff $600 with which to buy personal property and pay expenses of moving from Chicago to Wood county, and the remaining $600 the defendant was to retain and apply as part of the purchase price of said farm, and the same was done accordingly; that the defendant opened the car containing the household goods, etc., of the plaintiff when it arrived at Nekoosa, and removed the same to the Boyd farm which had theretofore been leased for the purpose of moving thereon by the plaintiff; that the defendant admits that he took an option from the plaintiff to sell the farm so purchased by the plaintiff, and in case of making sale to have therefor all he received over and above $1,350, of which sum the plaintiff was to have $750, and the remaining $600 the defendant was to retain in payment of the $600 he had loaned to the plaintiff as mentioned.

The plaintiff being called as a witness, the defendant interposed a demurrer *ore tenus* to the complaint on the ground seemingly that a cause of action in tort had been joined with one on contract. The court overruled the demurrer *ore tenus,* and on the request of the respective counsel stated in effect

that, if the defendant was liable at all under the complaint, it was upon contract and not in tort by reason of the option of the defendant to sell the farm. Thereupon the plaintiff elected to proceed upon the theory of a contract to repay the $600 and the $150. Thereupon the defendant moved to continue the cause over the term, which was denied by the court. The trial then proceeded, and at the close of the testimony the court directed the jury to return a verdict in favor of the plaintiff and assess his damages at $771.25, principal and interest. From the judgment entered upon that verdict accordingly the defendant appeals.

D. D. Conway, attorney, and *Daniel H. Grady,* of counsel, for the appellant.

For the respondent there was a brief by *Goggins & Brazeau,* and oral argument by *T. W. Brazeau.*

CASSODAY, C. J. 1. Upon objection to evidence under the complaint the trial court seems to have been of the opinion that if the defendant was liable to the plaintiff at all his liability was founded upon the settlement of the wrongs previously alleged in the complaint and the promise and agreement to repay to the plaintiff the $600 he had realized and retained on the mortgage and the $150 alleged to have been realized on the sale of the farm, over and above the $1,350 therein mentioned. However that may have been, we are clearly of the opinion that there was no error in allowing the plaintiff to elect upon the trial "to proceed upon the theory of a contract to repay the $600 and the $150" mentioned.

2. Nor do we think there was any error in refusing to continue the cause when called for trial May 31, 1906. That application was based upon a letter from the defendant to his counsel dated at Chicago May 30, 1906, announcing that he was unable to be present at the trial by reason of sudden illness, and a certificate, purporting to be from a physician in Chicago, to the same effect, neither of which was verified.

After verdict was so directed May 31, 1906, and on August 16, 1906, the defendant obtained an order to show cause why the verdict should not be set aside and a new trial granted by reason of such alleged error in so refusing to continue the cause May 31, 1906, which order to show cause was based upon the pleadings, papers, records, files, and the affidavits of the defendant and his attorney and physician. From the affidavit of the attorney it appears, among other things, that May 26, 1906, the defendant informed him that he was very sick and would be unable to be present at the trial, if reached within two or three weeks from that date. The plaintiff's attorneys then consented that the cause might go to the foot of the jury calendar, which would not be later than June 2, 1906, and May 29, 1906, the defendant was notified accordingly by his attorney and told that the cause would be reached and called for trial on the morning of May 31, 1906. On the day last named the attorney received a letter from the defendant to the effect that he started to come to Grand Rapids, but was overcome by sickness when he reached the Union Depot and so was obliged to return; and he informed the court of the facts stated and that he could not safely proceed to the trial of the action without the testimony of the defendant. From the physician's affidavit it appears that in May and June, 1906, he was a regularly licensed physician, practicing as such in Chicago, and had for years been the family physician of the defendant; that on May 24, 26, and 28, 1906, the defendant called at his office for treatment; that on examination, and the history of the case and symptoms present, the defendant was suffering from dizziness and affection of the nervous system, and that his condition was such as to make it necessary for the defendant to remain quiet and avoid all forms of excitement and nervous strain, and so he advised the defendant to remain at home and take perfect rest for twenty days, and to avoid outdoor heat and riding on cars, and that such contemplated trip would be dangerous.

From the defendant's affidavit it appears that on May 23, 1906, while traveling in Juneau county, Wisconsin, he was taken ill with dizziness and darting pains in his head and a high fever and so returned home and consulted his physician, who advised him as stated and that he should not attend to business of any kind more than one hour a day and that in the forenoon; that contrary to such advice he started for Grand Rapids May 30, 1906, but at the depot he was taken ill as stated, and so found it necessary to return home. The affidavit restates the negotiations in some respects differently than alleged in the answer, and embodies a formal affidavit of merits, and then reiterates the optional agreement mentioned in the complaint and answer, whereby the defendant was to sell the farm and have all it brought over and above $1,350; that the defendant thereafter found a person who agreed to pay $1,500 and paid thereon $150, and agreed to pay $750 in thirty days and to assume the $600 due on the plaintiff's contract; that such prospective purchaser failed to raise the $750 and so the agreement was canceled.

In answer to such order to show cause, four affidavits on behalf of the plaintiff were presented to the court, from which it appears that the defendant was in his office on the eleventh floor of the Ashland Block in Chicago between 11 and 12 o'clock a. m. May 31, 1906; that he engaged in an extended conversation about another suit pending against him in Wood county; that he walked from his office to the elevator, a distance of about sixty feet, and appeared to be "perfectly competent and able physically and mentally to attend to his business affairs." Another of the affiants had an interview with the physician mentioned August 28, 1906, and the doctor told him that the defendant called on him May 30 or May 31, 1906, and said he was not feeling well; that he was suffering from nervousness; that he appeared to be in perfect health physically; that the defendant then asked the doctor to make an affidavit as to his physical condition, which he did; that

the statements contained in the affidavit were made solely upon the statements made by the defendant to him on the day named; that unless physical imperfections or ailments are apparent to the eye, then any statement or affidavit in respect to them must of necessity be based solely upon statements made by the person so affected, as in this case. Another of the affiants testified that he was an attorney at law residing in Nekoosa, Wood county; that on May 29, 1906, on returning from St. Louis, Missouri, he stopped in Chicago and called on the defendant at his office in the Ashland Block, with whom he was well acquainted by reason of his extensive real-estate business in and about Nekoosa; that he went into the defendant's office about 11 o'clock a. m. of the day named; that he remained there until noon visiting with the defendant; that he saw the defendant again in the office of the Chicago, Milwaukee & St. Paul Railway Company about 3 o'clock of that day and again at the theater on the evening of that day; that he looked as he usually did, but said he was sick and not attending to business, and that he could not be present at the trial of this action and had sent to his attorney a certificate of his physician to that effect. Upon such showing and the records and files in the case the trial court refused to set aside the verdict and grant a new trial.

The continuance of a cause for the absence of a witness is a matter addressed to the sound discretion of the trial court. *Hayes v. Frey,* 54 Wis. 503, 11 N. W. 695; *Hill v. Fond du Lac,* 56 Wis. 242, 14 N. W. 25; *Allis v. Meadow Spring D. Co.* 67 Wis. 16, 29 N. W. 543, 30 N. W. 300; *McMahon v. Snyder,* 117 Wis. 463, 94 N. W. 351. Where, as here, the absent witness is a party to the action, good cause should certainly be shown before a continuance should be granted on account of such absence; and especially is this true where, as here, it is sought to set aside the verdict and grant a new trial. The defendant had nearly five months to prepare for trial. If for any cause there was apprehension that he might not be able to attend the trial, his deposition could have been taken.

Manifestly, the confidence which the trial court otherwise might have had in the affidavits of the defendant and his physician may have been, and undoubtedly was, badly shaken by the affidavits presented on behalf of the plaintiff. We cannot say that there was any abuse of discretion in the ruling mentioned.

The optional agreement alleged in the complaint is expressly admitted in the answer to the effect "that in case of sale" by the defendant of the farm "for $1,350 or more the plaintiff was to have $750 and the remaining $600 was to go to the defendant for payment of money loaned to the plaintiff." The complaint also alleged that the defendant had thereafter sold the farm for $1,500. There is no denial of that allegation in the answer unless it be by the general denial of what was not therein specially admitted, qualified, or explained. On the trial the plaintiff testified that the defendant told him in September, 1905, that he had sold the farm for $1,500, and repeated the same two weeks before the trial. Such admissions of having sold the farm were not disputed on the trial. In the defendant's affidavit mentioned he admitted that he found a person who agreed to purchase the land for $1,500, and who paid him thereon $150 and agreed to pay the balance as above stated. The plaintiff never received any conveyance of the farm and never occupied the same. Thus it is undisputed that at the time of the trial the defendant had received the $600 realized on the mortgage for which the plaintiff had received nothing, and which amount, together with the $150 mentioned, he promised and agreed before suit to pay to the plaintiff in settlement of the controversy. By reason of such promise and agreement and the undisputed evidence the verdict was directed in favor of the plaintiff as mentioned. There are no other questions calling for consideration.

By the Court.—The judgment of the circuit court is affirmed.

HOCKING, Respondent, vs. WINDSOR SPRING COMPANY, Appellant.

April 9—April 30, 1907.

Master and servant: Injuries from defective machinery: Court and jury: Expert testimony: Striking out testimony: Sufficiency of ruling: Physicians and surgeons: Competency to testify: Special verdict: Damages: Instructions to jury: Excessive damages.

1. In an action for personal injuries caused by a splinter broken from a die in a punch press which plaintiff was operating for defendant, the question whether the die produced in court by plaintiff was the one from which the splinter came is *held*, upon the evidence, to have been for the jury.
2. Testimony of witnesses in such case that they had examined and compared, with the aid of a magnifying glass, the splinter and the crevice in the die produced by plaintiff, and had tested the material of both as to hardness and similarity of surface and grain, and that from such examination they could state that the splinter came from that die, was competent and proper.
3. Expert testimony to the effect that the die was improperly set, based on the facts that it sheared and that the knife of the die became loosened as it was operated, and on the marks appearing on the dies, was also proper.
4. Plaintiff's counsel, in presence of the jury, asked that certain opinion evidence introduced by him be stricken out and the jury requested not to consider it. The court stated: "The motion is granted and the jury is so instructed," but gave no further instruction on the subject. *Held*, that this ruling, in connection with the language of counsel's request, sufficiently informed the jury that the evidence in question was not to be considered.
5. Sec. 1436, Stats. (Supp. 1906; Laws of 1903, ch. 426), does not preclude a physician who holds neither the license nor the certificate of registration there referred to from testifying to facts not within the field of an expert but within the observation of any person. So *held* as to testimony of a physician that he found plaintiff's eye had been injured by some object; that he washed the eye, sent plaintiff to the hospital, and there removed a metal splinter from the eye with a magnet; and that he afterwards removed the eye.
6. Where by a special verdict it is found that defendant's negligence was the proximate cause of injuries to plaintiff, it was not error

to refuse to submit in such verdict questions as to whether the injuries were not the result of mere or unavoidable accident.

7. An instruction that plaintiff was entitled to recover "such sum as will fully compensate him for the loss of his eye and the disadvantage, disfigurement, and inconvenience it is reasonably certain from the evidence will result from such loss," is *held* not to have misled the jury to understand that they might duplicate the damages by allowing full compensation for the loss of the eye and further compensation for the resulting disadvantage, disfigurement, and inconvenience.

8. An award of $5,000 for the loss of an eye, involving much pain and suffering, is *held* not excessive.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This is an action to recover damages for the loss of an eye which it is alleged is attributable to the negligence of the defendant. The case was before this court on a former appeal from the judgment of the lower court, and is reported in 125 Wis. 575, 104 N. W. 705. The defendant is a corporation engaged in manufacturing at Kenosha, Wisconsin. On September 14, 1901, the plaintiff was engaged as an employee of the defendant in operating a machine used for cutting bedspring slats. His regular employment was that of enameler, and he had only been engaged at this work for the defendant a short time preceding the accident. Prior to this he had been employed by the defendant, but at an entirely different kind of work. For perhaps three months prior to the accident he had again been employed by the defendant, but he had been working at other work than that at which he was injured, with the exception of a few hours at a time and for the week previous to the accident, when he had been employed continuously at the machine which he claimed operated defectively and thereby caused him the injuries now complained of. This machine is called a punch press. The stock or material to be shaped is placed on a plate or die which has a hole in it. A punch or knife, which fits closely into the hole in the die, descends upon the stock, passes through it into the

hole in the die, and thus cuts and shapes the stock. The punch or knife is fastened in place by screws to the part which descends whenever the foot is placed on a lever, causing the machine to operate. The machine is alleged to have operated defectively, in that the punch or knife was insecurely fastened and did not descend exactly into the hole in the plate or die, but the edge of the knife struck on the edge of the hole. This action, it is claimed, broke off a splinter of the die and threw it into plaintiff's eye, causing the injury which necessitated the removal of the eye and impaired the use of the other.

Plaintiff testified that previous to the injury there had been a chucking or scraping noise and that he had directed the foreman's attention to it; that the foreman had tightened up some screws, tried the machine, and then directed him to go ahead with his work. He also testified that within an hour of the accident he called the foreman's attention to the fact that the screws holding the knife were worn and loose, and that the foreman promised to send for some new ones as soon as possible. The splinter taken from plaintiff's eye was claimed to be part of a die which, two weeks after the accident, was taken by the plaintiff from a shelf back of the machine at which plaintiff was working when injured. The defendant claimed to have taken the die which was in use on the machine at the time of the injury from the machine a few days after the accident and to have retained it thereafter. There was evidence that the splinter and the die produced by plaintiff were alike in quality, were tool steel, that a splinter had broken off of this die which in form, size, hardness, and magnetic quality was like the splinter produced by plaintiff, and that the grain of the break on the splinter and the die from which the plaintiff claimed it had come were alike. There was proof tending to show that the die produced by plaintiff had been used for about twenty times after the splinter had been broken off.

At the suggestion of the court the following question in substance was asked of various witnesses:

"Assuming it to be proven and true that an inexperienced man, or one having about three weeks' experience in operating a punch press, using the dies shown you for the cutting of metal, and he had never been instructed as to setting dies, is placed to operate and use such punch press in such work, how often should such machine be inspected by the experienced die-setter having charge of the machine?"

This was answered and the evidence received over defendant's objection. Near the end of the trial plaintiff's counsel in the following form requested the court to strike this evidence from the case:

"During the examination of our witnesses several of them were asked for their opinion as to how frequently machines of this kind should be inspected, and I think objection was made to several questions, and I desire that they be stricken out, and all expressions of opinion on the part of any of our witnesses as to how often machines of this character doing this work should be inspected be stricken out, and the jury requested not to consider their statements as to their opinions as to how frequently they should be so inspected, with the understanding, however, that the testimony I also introduced, as to the custom of inspecting machines, be left in and be permitted to be considered by the jury."

To this request defendant's counsel objected, and the court thereupon made a ruling as follows: "The motion is granted and the jury is so instructed." Testimony was given by a physician and surgeon of Chicago of the facts about the injury to the eye and the removal of the eye.

The case was submitted to a jury and a special verdict was rendered finding the defendant guilty of negligence, that such negligence was the proximate cause of the injury, and that plaintiff was free from contributory negligence. Plaintiff's damages were assessed at $5,000. From a judgment on a special verdict in favor of the plaintiff the defendant appeals.

For the appellant there was a brief by *Vilas, Vilas & Freeman,* and oral argument by *E. P. Vilas.*

For the respondent there was a brief signed by *Norman L. Baker* and *B. J. Wellman & R. V. Baker,* and oral argument by *Norman L. Baker.*

SIEBECKER, J. Upon the former appeal to this court it was held that the evidence before the court required submission of the case to the jury upon the issues of defendant's negligence and plaintiff's assumption of the risk of the dangers incident to the operation of the alleged defective machine. 125 Wis. 575, 104 N. W. 705. It is now contended that the evidence on these questions on this appeal materially differs from that of the former, in that it now conclusively appears that by the chucking noises of the machine when operating it plaintiff was apprised of the danger complained of and led to complain to the foreman that the machine was not in a safe working condition. An attentive reading of the evidence discloses no substantial difference as to the state of the proof on these questions on the two trials.

It is also claimed that the evidence is undisputed that the part of the die produced by the plaintiff is not the one from which the splinter that injured him could have chipped, because it was not in use at the time of the accident, and for this reason it is claimed that the case is devoid of any showing that the injury is attributable to the negligence of defendant for failing to furnish him with a safe machine with which to work. There is evidence tending to show that two weeks after the accident this die was taken from a place near the machine where dies used in this machine were kept, that the splinter removed from plaintiff's eye corresponded in form, shape, and grain to the crevice on the die, and that the material of the die and of the splinter was alike in hardness and texture. The evidence that this die was not used is not so conclusive in its nature as to absolutely rebut the permissible

inference that the splinter came from the die produced by plaintiff and that it was in fact in use when he was injured. This called for submission of this question to the jury, as the court ruled.

Appellant alleges an exception to the reception of the evidence of witnesses testifying that they had made an examination and comparison of the splinter and the crevice in the die with the aid of a magnifying glass, and had tested the material of the die and splinter as to hardness and similarity of surface and grain, and that from such examination and inspection they could state that the splinter came from the crevice in the die. This testimony was competent and proper. It tended to establish the identity of the die from which the splinter came and that the die was in use when the accident happened. Their observations were not within the range of common knowledge, but within a field wherein special knowledge and experience in these respects enabled them to form conclusions as to such facts, and this made such information proper evidence thereof.

Another exception is urged to the evidence of witnesses who testified that the die was improperly set. They based their conclusion on the fact that it sheared, and that the knife of the die became loosened as it was operated, and on the marks appearing on the dies. This evidence related to the defect complained of and involved in the operation of the machine under the circumstances shown, and presented a situation wherein the jury could not form as reliable an opinion as an expert on the subject. Hence it was properly received and submitted in the case.

A number of witnesses were permitted to answer, over defendant's objection, the inquiry as to how often the machine wherein the die and punch knife were being used and operated by an inexperienced workman should be inspected by an experienced die-setter having charge of it. They answered in effect that such inspection should be made as often as once

each half hour or once an hour. This question was propounded by plaintiff's counsel at the court's suggestion in ruling on an objection to testimony.

At the conclusion of the testimony plaintiff's counsel requested that the answers of witnesses giving their opinion of the frequency with which such inspection should be made be stricken out, "and the jury requested not to consider their statements as to their opinions as to how frequently they should be so inspected, with the understanding, however, that the testimony I also introduced, as to the custom of inspecting machines, be left in and be permitted to be considered by the jury." The court ruled on this request, stating: "The motion is granted and the jury is so instructed." No further direction or instruction was given on the subject. It is urged that the court's action in this particular did not sufficiently inform the jury of the effect of the ruling, and thus prejudiced defendant by permitting them to take this testimony into consideration in determining the question of the negligence charged. True, the ruling as framed by the court is very tersely stated and might well have been amplified for an aid to the jury; but it must be taken in connection with the language of counsel's request, which was made in their presence and specified what testimony he asked to have stricken out and that the jury be instructed not to consider it in the case. His request explicitly demanded that the testimony be withdrawn from the case and the jury be requested not to consider the statements given by these witnesses as to how frequently the machine and dies operated by an inexperienced workman should be inspected. This plainly conveyed the information that such evidence was removed from the jury's consideration, and the jury must have so understood it. The ruling is not so involved or so indefinite that it can reasonably be said that the jury were not informed of the action of the court.

The incompetency of Dr. Hawley as a witness in the case

is alleged under ch. 426, Laws of 1903, which provides that no person shall have the right to collect any fees for medical or surgical services or "to testify in a professional capacity as a physician, or surgeon, or insanity expert . . . unless he or she holds a license" or a certificate and diploma, or a membership in a medical society, duly recorded as prescribed, and that nothing in the act shall restrict courts from receiving the testimony of any person in a criminal action. It is undisputed that Dr. Hawley was not a resident of this state and had not complied with the provisions of this statute. The doctor testified that he found that plaintiff's eye had been injured by a cut from some object which passed into it and penetrated the lens; that he washed the eye, sent plaintiff to a hospital, and there removed the splinter from the eye with a magnet; and that he afterwards removed the eye. These facts are not disputed in the case. It is averred that this statute disqualified him to testify to any of the facts above stated, because he is within the class of persons practicing medicine or surgery who are debarred from testifying "in a professional capacity as a physician, or surgeon, or insanity expert in any case," except criminal actions. We are of opinion that this contention gives to this statute a wider scope than its context warrants. Applying the language of the statute to the subject covered by the legislation, it is clear that persons practicing medicine and surgery are thereby deprived of the right to collect any compensation for such services, and "to testify in a professional capacity as a physician, or surgeon, or insanity expert," unless they comply with the law. The phraseology of the law is quite clear and direct in expressing a legislative intent that such persons should be disqualified to testify as experts in their professional capacity. Such a disqualification, however, would not affect their competency to testify to facts not within the field of an expert. As to such matters their qualifications would be governed by the rules applicable to any other person. It is averred that the evidence of Dr. Haw-

ley was in its nature expert evidence of a physician and surgeon. The evidence, however, discloses that, aside from the statement that the splinter penetrated the lens, the doctor testified to nothing but what was within the observation of any person, and this statement had no bearing on the controverted issues litigated. It could not have operated to defendant's prejudice, since it was practically admitted that the eye was so seriously injured as to necessitate its removal. Under these circumstances we find nothing in the testimony of Dr. Hawley which should have been excluded from the case.

It is averred that the court erred in not submitting in the special verdict, as requested, the question of whether plaintiff's injuries were not the result of a mere or unavoidable accident. The question of defendant's negligence was covered by the special verdict and the findings of the jury, which included a finding that such negligence was the proximate cause of the injury. Under these circumstances the subject of the questions was covered and determined by the verdict rendered. As stated in *Byington v. Merrill,* 112 Wis. 211, 88 N. W. 26, "the answers to those questions necessarily covered the subject of whether the injury to respondent was the result of a mere accident, and the question requested upon that subject was very properly refused."

Several exceptions are preserved to the refusal to give some of the defendant's requested instructions and to those given by the court on the subjects covered by them, defendant averring and claiming that prejudicial errors were committed in these respects. After an examination of them we are led to the conclusion that no such errors exist, and that but one of them requires specific attention at this time.

In connection with an enumeration of the elements of past and future damages shown by the evidence the court gave the following instruction:

"Plaintiff . . . is entitled to recover for such loss of time as you are satisfied from the evidence he has reasonably sus-

tained as a result of the injury; further, such sum as will fully compensate him for the loss of his eye and the disadvantage, disfigurement, and inconvenience it is reasonably certain from the evidence will result from such loss."

It is contended that the quoted part of the instruction is misleading, in that it instructed the jury that they might duplicate the damages by allowing full compensation for the loss of an eye, and for the elements of disadvantage, disfigurement, and inconvenience resulting from it. While the instruction, in its grammatical form, may be susceptible of such construction, yet it does not necessarily follow that the jurors so understood and treated it. In their application of it to the situation at hand they must have understood that the damages resulting from disadvantage, disfigurement, and inconvenience were comprehended and included in the loss of the eye and therefore not additional to the damages occasioned by the loss of it. This interpretation is reasonable, and treats the instruction in the sense evidently intended by the court and understood by the jury.

We cannot accede to the claim that the amount of damages awarded is excessive. In addition to the injuries resulting from the loss of his eye, which need not be repeated here, it appears that plaintiff endured much pain and suffering on account of its treatment and removal and from the conditions consequent to such loss. We find no ground for declaring the amount to be in excess of an actual compensation for the injuries sustained.

No other question suggested is deemed to require special attention. We find no reversible error in the record.

By the Court.—Judgment affirmed.

WALKER, Respondent, vs. SIMMONS MANUFACTURING COMPANY, Appellant.

April 10—April 30, 1907.

Master and servant: Injury to servant: Unguarded shafting: Duty to furnish safe place: Evidence of relation of employer and employee: Assumption of risk: Insufficient light: Court and jury: Instructions: Special verdict: Waiver of defects or omissions: Excessive damages.

1. In an action for injuries to an employee caused by an unguarded set-screw projecting from a revolving shaft in defendant's factory, the evidence is *held* to sustain findings in the special verdict to the effect that plaintiff at the time of the accident was working at a place in which he was authorized by defendant to do his work; that the unguarded set-screw was so located as to be dangerous to plaintiff at his work in that place; and that plaintiff did not assume the risk and was not guilty of contributory negligence.
2. The set-screw being so located as to be dangerous to employees while doing their work, it was the duty of defendant, under sec. 1636*j*, Stats. (1898), to securely guard it.
3. Evidence tending to show that plaintiff when injured was at work in one of the departments of defendant's factory, the working place and the necessary machinery and appliances being furnished by defendant; that he was paid by the piece, but that defendant hired the men who assisted him, and paid them out of his earnings; and that plaintiff and the men were subject to the supervision and direction of defendant's superintendent, and were in fact in some cases directed in their work by him, is *held* sufficient to sustain a verdict to the effect that the relation of employer and employee existed.
4. One who furnishes to another a working place, machinery, and appliances with which to do his work owes to the latter the duty of furnishing him with a reasonably safe place in which to do his work.
5. In submitting for special verdict the question whether the working place furnished by defendant was a reasonably safe one, the jury were instructed that if the shafting in that place was "so located as to be dangerous to plaintiff in the discharge of his duties in the line of his employment at the time of the injury" they should answer the question "No." *Held*, that a further statement of what the law required in respect to guard-

ing dangerous shafting did not render the instruction prejudicially erroneous as informing the jury of the effect of their finding; and, it being undisputed that the shafting was not guarded at any time, the jury could not have been misled.

6. The words, in such instruction, "in the line of his employment at the time of his injury" could not have misled the jury, but must have been understood as having reference to the performance of his ordinary duties under his employment.

7. Failure in the charge to distinguish between furnishing a safe place originally and thereafter exercising ordinary care to keep it reasonably safe, and failure to submit in the special verdict the question whether defendant originally furnished a safe place and thereafter used ordinary care in maintaining it, cannot be complained of by appellant where a proposed question on that subject was excluded from the verdict upon his objection and insistence that it was not a material fact to be submitted to the jury.

8. In an action for injuries to an employee caused by the catching of a bed spring which he was handling upon a projecting and unguarded set-screw upon a line of overhead shafting in defendant's factory, the insufficiency of light, if there was such, at the time and place in question was a fact properly to be considered by the jury in determining whether plaintiff assumed the risk, but alone was not sufficient to charge him with assumption of unknown dangers.

9. An award of $5,000 for injuries to a laborer forty years old which left his hand in a mutilated and practically useless condition, is *held* not excessive.

APPEAL from a judgment of the circuit court for Kenosha county: J. J. FRUIT, Judge. *Affirmed.*

This action was brought to recover for personal injuries sustained by plaintiff on the 22d day of March, 1905, while engaged in defendant's factory at Kenosha, Wisconsin. The complaint charges that the plaintiff was in the employ of the defendant and engaged in the work of receiving and piling bed springs in the storeroom of defendant's factory; that it was the duty of the defendant to provide plaintiff with a safe place to perform his work; that defendant failed in this regard, in that it negligently permitted a defective, worn, and improper set-screw to be used, which set-screw fastened an iron collar around a revolving shaft, and neglected to cover the

shaft, set-screw, and collar with safeguards to prevent injury to plaintiff, as provided by sec. 1636*j*, Stats. (1898), and acts amendatory thereof, and negligently permitted the set-screw to become loose and project beyond the outer surface of the collar three fourths of an inch, and negligently and without warning to plaintiff permitted the collar and set-screw to slide along and upon the shaft several feet away from the arm where the collar was attached to hold the arm firmly, and negligently caused the room and premises where plaintiff was performing his duty to be insufficiently and improperly lighted. The complaint further alleges that on the day named, and while plaintiff was in the performance of his duty piling bed springs under and near the shaft to which said set-screw and collar were attached, and without any warning to the plaintiff or negligence on his part, one of the wire springs caught on the projecting set-screw, and plaintiff's hand was caught between the bottom of the bed spring and the shaft, which caused the injury.

The answer denies the material allegations of the complaint, and further avers that the presence, location, and nature of the set-screw and collar were open, obvious, and well known to the plaintiff, and that he assumed the risk and was guilty of contributory negligence.

At the close of the testimony defendant moved for a directed verdict, which was denied. The jury returned the following verdict:

"(1) On March 22, 1905, at the time of the accident to the plaintiff, was the relation existing between the plaintiff and the defendant that of employer and employee? *A.* Yes. (2) At the time of receiving the injuries of which he complains, was the plaintiff engaged in work at a place in which he was authorized by the defendant to engage in the performance of such work? *A.* Yes. (3) If you answer the second question 'Yes,' then was such place so furnished by the defendant a reasonably safe place in which to do his work? *A.* No. (4) If you answer the third question 'No,' then was

such failure to furnish a reasonably safe place the proximate cause of the plaintiff's injury? *A.* Yes. (5) Was there any want of ordinary care on the part of the plaintiff which contributed to his injury? *A.* No. (6) If the court shall finally determine the plaintiff is entitled to recover, at what sum do you assess his damages? *A.* $5,000."

Motions were made for judgment in favor of the defendant notwithstanding the verdict and also that the verdict be set aside and a new trial granted. Judgment was rendered in favor of plaintiff on the verdict, from which this appeal was taken.

For the appellant there was a brief by *Vilas, Vilas & Freeman,* and oral argument by *E. P. Vilas.*

For the respondent there was a brief by *Ernest A. Kehr* and *N. L. Baker* and *W. J. Zimmers,* and oral argument by *Mr. Kehr* and *Mr. Baker.*

KERWIN, J. Several errors are assigned by appellant, and so far as necessary to the disposition of this appeal will be treated in their order.

1. It is insisted that a verdict should have been directed for defendant on the ground that the evidence established conclusively that the defendant was not guilty of negligence and that plaintiff was guilty of contributory negligence and assumed the risk. In this behalf it is insisted that plaintiff had been at work on the premises for several years and was familiar with them and aware of the danger; that he was not at the time of the injury within the territory assigned to him, but was in a place unauthorized by defendant; that he was an independent contractor, and hence the relation of master and servant did not exist; that the set-screw upon which plaintiff was injured was nine feet above the floor and not in any way dangerous to employees, and hence defendant was under no obligation to guard it.

It appears from the evidence that plaintiff had been em-

ployed by defendant some four years before his injury, but his employment was such as not to bring him in close contact with the machinery in the factory or familiarize him with it. His first employment was at the knotter, and at such other work as was required of him until the end of the year 1902, after which he had charge of the piling of the wire bed springs under the supervision of the superintendent of the spring department. In this connection his duties were to receive wire beds or bed springs which came from another department of the factory and prepare them for shipment by pressing them together with a press and piling them up in a storeroom assigned by defendant for that purpose. The shipping room in which plaintiff was injured was 152 feet north and south and 171 feet east and west. There was a line shaft running north and south and attached to posts by hangers. This shaft was ninety-three feet from the west end of the building and thirty-five feet from the nearest wall east. It was nine feet above the floor, and ran in a hanger which was eight or nine inches towards the west from a post to which it was bolted, and was about three feet from the ceiling. At the time of the injury the shaft was making about 285 revolutions per minute. The entire floor on which plaintiff was at work at the time of the injury was used for storing the finished product, springs, wood frames, wire mattresses, and all wire spring beds. At the place of injury the shafting ran in a bearing or box, and a collar and set-screw were originally set and belonged on the south side of the box or hanger tight against the box. This collar and set-screw were put in place at the time the shaft was hung.

There was a partition along the line of posts immediately east of the shafting, east of which was the territory which was ordinarily occupied by the plaintiff for the performance of his work; but at the time of the injury he was not within this allotted territory, but was piling spring mattresses on the west side of the partition and under the shaft in question, and,

while lifting a mattress to place it on top of others under or beside the shaft, it was caught by the set-screw, and his hand, together with the mattress, drawn around the shafting, in consequence of which he sustained the injuries complained of. There is evidence tending to show that at the time of the injury the set-screw extended some three fourths of an inch beyond the collar, and that the collar and set-screw had moved some two feet or more away from the bearing or box where originally placed, but just how, or when, so removed does not appear. There is also evidence that while plaintiff ordinarily used the territory allotted to him he also used the territory under the shaft in question, where he received the injury, with the permission of the defendant's superintendent, and that he was not familiar with the set-screw and did not know that it was located so as to be dangerous; that at the time of the injury the territory allotted to him was well filled and he was forced to do his work at the place where he received the injury. It also appears from the evidence that it was difficult to see the set-screw when the shaft was in motion.

We think it very clear that there is ample evidence to show that plaintiff was at the time of the injury occupying the space in question under the revolving shaft and set-screw with the assent of the defendant and without knowledge of the dangers to which he was exposed. Whether this shafting was so located as to be dangerous to employees in the discharge of their duties depends upon the facts and circumstances of the case, and upon the evidence we think it clear that the question of whether it was or was not so located as to be dangerous to plaintiff in the discharge of his duty was a question for the jury. *Kreider v. Wis. River P. & P. Co.* 110 Wis. 645, 86 N. W. 662. We think it equally clear from the evidence that it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence or assumed the risk. *Hocking v. Windsor S. Co.* 125 Wis. 575, 104 N. W. 705.

Sec. 1636*j*, Stats. (1898), makes it the duty of the owner or manager of every place where persons are employed to perform labor to securely guard belting, shafting, and gearing which are so located as to be dangerous to employees in the discharge of their duty. But it is claimed by counsel for appellant that the shafting in question here was not so located as to be dangerous, and, besides, the plaintiff was outside of his allotted territory, and when injured was at an unauthorized place; but, as before observed, the testimony is ample to show that plaintiff was engaged in the discharge of his duty and at an authorized place when injured. This being so, the proof amply establishes that the unguarded set-screw was dangerous to employees working in the position in which plaintiff was at the time of the injury. Under such circumstances the defendant was bound to guard the dangerous machinery. *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563. But it is argued that the set-screw and danger were open and obvious, and that knowledge of the dangerous condition must be imputed to plaintiff; hence he assumed the risk. The evidence does not warrant this conclusion. Plaintiff testified that he had no knowledge of the dangerous condition, that it was difficult to see the set-screw when the shaft was in motion, and that it could not be determined whether the screw projected beyond the collar in such manner as to be dangerous. We think it very clear from the evidence that it cannot be said as matter of law that plaintiff knew the danger or appreciated the risk. *Hocking v. Windsor S. Co., supra; Kreider v. Wis. River P. & P. Co., supra.*

It is insisted that the court should have directed a verdict for defendant because plaintiff was an independent contractor, and that the supervision retained by defendant over plaintiff was not such as to create the relation of employer and employee. This question was submitted to the jury and they found that such relation existed at the time of the injury. The evidence tends to show that plaintiff was at work

in one of the departments of defendant's factory and under the supervision of defendant's foreman, and that defendant furnished the working place and machinery necessary for plaintiff to do his work, and hired the men who assisted plaintiff, fixed their wages, and paid them out of plaintiff's earnings. But these men, as well as plaintiff, were subject to the supervision and direction of the superintendent of defendant, and in fact were in some cases directed in their work by him. We think it clear that there was ample evidence to support the verdict that the relation of employer and employee existed. 1 Shearm. & Redf. Neg. (5th ed.) § 164; *Cunningham v. Int. R. Co.* 51 Tex. 503; *Neimeyer v. Weyerhaeuser,* 95 Iowa, 497, 64 N. W. 416; *Barg v. Bousfield,* 65 Minn. 355, 68 N. W. 45. Exception is taken to certain parts of the judge's charge to the jury upon this question, but we are unable to discover any error in the charge in this regard, and think the question as to whether the relation existing between plaintiff and defendant was that of employer and employee was fairly submitted to the jury. Moreover, it is without dispute that defendant furnished plaintiff a working place, machinery, and appliances with which to do his work, and under such circumstances the defendant owed plaintiff the duty of furnishing him with a reasonably safe place in which to do his work. 1 Thomp. Comm. on Neg. § 679; *Bright v. Barnett & R. Co.* 88 Wis. 299, 60 N. W. 418; *Carlson v. Stocking,* 91 Wis. 432, 65 N. W. 58; *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360, 64 N. W. 1041; *Wertheimer v. Saunders,* 95 Wis. 573, 70 N. W. 824; *Johnson v. Spear,* 76 Mich. 139, 42 N. W. 1092; Wood, Mast. & Serv. 699, § 337; *Coughtry v. Globe W. Co.* 56 N. Y. 124; *Conlon v. Eastern R. Co.* 135 Mass. 195; *Kelly & Sons v. Howell,* 41 Ohio St. 438; *Ferris v. Aldrich,* 58 Hun, 610, 12 N. Y. Supp. 482; *Stevens v. United G. & E. Co.* 73 N. H. 159, 60 Atl. 848.

We are cited by counsel for appellant to *Harris v. McNamara,* 97 Ala. 181, 12 South. 103; *Forsyth v. Hooper,* 11

Allen, 419; *Hexamer v. Webb,* 101 N. Y. 377, 4 N. E. 755; and *Ziebell v. Eclipse L. Co.* 33 Wash. 591, 74 Pac. 680. These cases are not out of harmony with the doctrine heretofore laid down and cases cited. In *Harris v. McNamara, supra,* the master reserved no authority over the employee, furnished no tools or appliances, and the means and details of the work were subject to the exclusive management and control of the servant. In *Hexamer v. Webb, supra,* plaintiff was clearly an independent contractor. The mode and manner in which his work was to be done and the means to be employed in its accomplishment were left to his skill and judgment. Everything connected with the work was wholly under his direction and control and no right reserved to the defendant, and under the engagement the relation of master and servant clearly did not exist. *Forsyth v. Hooper, supra,* also presents a case of an independent contractor. There the person employed was engaged under an entire contract for a gross sum, and in the independent operation not subject to the control of his employer, and the court said:

"The question in these cases, whether the relation be that of master and servant or not, is determined mainly by ascertaining from the contract of employment whether the employer retains the power of directing and controlling the work, or has given it to the contractor."

Ziebell v. Eclipse L. Co., supra, presents a case where defendant, owner of a mill, entered into a contract whereby an experienced manufacturer contracted to take charge of the mill, employ and pay all laborers, make all necessary repairs, and receive a stipulated sum per thousand for shingles manufactured, and it was held that the manufacturer occupied the position of an independent contractor.

After a careful examination of the cases cited by appellant we are unable to see that they are applicable to the facts in the case before us, or support the contention of counsel that the relation existing between plaintiff and defendant here was not that of employer and employee.

2. Error is assigned in the charge and refusal to charge. Respecting the third question of the special verdict, as to whether the place furnished by defendant was a reasonably safe place, the court charged:

"The law requires that the employer shall securely guard or fence shafting which is so located as to be dangerous to employees in the discharge of their duties, and if you find that the shafting in question, under all the facts and circumstances proven, was so located as to be dangerous to the plaintiff in the discharge of his duties in the line of his employment at the time of the injury to him, you should answer the question 'No.'"

This charge is criticised on the ground that the court told the jury the effect of their answer. True, the court told the jury what the law required respecting the guarding of dangerous shafting, but did not tell them the effect of a finding either way upon this question. Besides, it is undisputed that the shafting was not guarded at any time. The jury could not have been misled under these circumstances by the statement of the court respecting the duty to guard dangerous shafting, in view of the whole record and the testimony properly and necessarily introduced upon this subject.

The words in this portion of the charge, "in the discharge of his duties in the line of his employment," are also criticised. It is insisted that these words did not convey to the jury the idea that at the time of the injury the plaintiff was performing his ordinary duties under the employment; but we think the jury could not have been misled by the use of the words "in the line of his employment at the time of the injury," but must have understood the words as having reference to the performance of his ordinary duties under his employment. The charge is further criticised because it fails to distinguish between furnishing a safe place originally, and thereafter exercising ordinary care in maintaining it in a reasonably safe condition, under the doctrine of *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48. It is insisted

that the charge and the verdict submitted to the jury presented the question merely whether the defendant furnished a reasonably safe place at the time of the injury, and that the question whether a reasonably safe place was originally furnished had never been submitted to the jury, nor whether defendant knew or had cause to know that the place became unsafe. So it is claimed that the ultimate fact in issue as to whether or not defendant originally furnished a reasonably safe place and thereafter used ordinary case in maintaining it was never submitted to the jury. But it appears from the record that counsel for plaintiff at the time the special verdict was made up requested that the question: "If you answer the third question 'No,' then was the defendant guilty of any want of ordinary care in furnishing plaintiff such place in which to do his work?" be included in the special verdict and submitted to the jury, and counsel for defendant advised the court that such question was unnecessary in the case. So, even if it be conceded that this fact should have been submitted to the jury, it is not for appellant to complain, since it was kept out upon his objection and insistence that it was not a material fact to be submitted to the jury.

On the fifth question, as to whether or not there was any want of ordinary care on the part of the plaintiff which contributed to his injury, the appellant excepted to the charge and refusal to charge as requested. The court charged:

"In considering and answering the fifth question you are instructed that, whatever the condition of the light may have been at the time and place of the accident to the plaintiff, that was a condition which he could at once perceive and was bound to take notice of when he went there. He was bound to use his senses and his faculties to observe such apparent condition. And if you find that the light at that time and place was not reasonably sufficient, but nevertheless the plaintiff assumed to work there, and by reason of such insufficiency of the light was injured, this you may consider together with all the other facts and circumstances shown in the evidence as bearing upon the plaintiff's contributory negligence."

The court further charged the jury that in considering this question they were instructed that plaintiff was bound to exercise "his senses, his experience, and his general knowledge of the place in which he was performing his work, in order to avoid danger which he either knew, or ought to have known in the light of his age, experience in the same room and building in which he had been engaged for over three years before he was injured, and his general knowledge and experience in life; and if he failed to do so and thereby contributed even in a slight degree to the injuries which he received, your answer to the fifth question must be 'Yes.' "

Upon the appellant's request the court refused to charge as follows:

"In considering and answering the fifth question you are instructed that, whatever the condition of the light may have been at the place and time of the accident to the plaintiff, that was a condition which he could at once perceive and was bound to take notice of when he went there. He was bound to use his senses and his faculties to discover such apparent conditions. And if you find that the light at that time and place was not reasonably sufficient, but nevertheless the plaintiff assumed to work there, and by reason of such insufficiency of the light was injured, he must be held to have assumed the risk of working there with such insufficient light and to have assumed the danger of working under such condition, and your answer to the fifth question should be 'Yes.' "

This refusal is assigned as error, and in support of this assignment counsel for appellant relies upon *Faber v. C. Reiss C. Co.* 124 Wis. 554, 102 N. W. 1049. But it will be seen that in the last-named case the want of light proximately contributed to the injury, while in the case before us it is clear from the evidence that the insufficiency of light was not the proximate cause of the injury. The question of insufficiency of light in the instant case was a fact properly to be considered in determining whether plaintiff assumed the risk, but alone was not sufficient to charge plaintiff with assumption of unknown dangers. *Kucera v. Merrill L. Co.* 91 Wis. 637, 65

N. W. 374. The charge given by the court, therefore, was proper and sufficient upon the subject, and appellant was not prejudiced by the refusal to charge as requested. The plaintiff assumed no risk respecting unknown dangers or those which by the exercise of ordinary care and prudence he could not have ascertained. It does not appear from the evidence that even if the factory was properly and sufficiently lighted he would have known the dangerous condition of the set-screw which caused the injury. He could not determine whether the light was sufficient to guard him against unknown dangers. If the shaft had been properly guarded, as plaintiff had a right to believe it was, then the light was sufficient. So in any aspect of the case there was no error in the refusal to charge as requested. The sufficiency of the light was not upon any theory of the evidence the proximate cause of the injury, nor was the evidence of insufficiency of light alone sufficient to support a verdict that plaintiff assumed the risk. *Bright v. Barnett & R. Co.* 88 Wis. 299, 60 N. W. 418; *Kucera v. Merrill L. Co.* 91 Wis. 637, 65 N. W. 374.

3. It is claimed that the damages are excessive. Plaintiff was forty years of age, a laborer, and capable of earning good wages. The injuries were serious and the jury assessed his damages at $5,000, and the court below refused to hold the verdict excessive. The plaintiff's hand was badly burned by the friction while being drawn around the shaft. He lost the first, second, and fourth fingers and also part of the back of the hand. The third finger was rendered stiff. The injury left the hand in a mutilated, disfigured, and practically useless condition. Upon the whole record we cannot say that the verdict is excessive. *Berg v. C., M. & St. P. R. Co.* 50 Wis. 419, 7 N. W. 347; *Taylor v. C. & N. W. R. Co.* 103 Wis. 27, 79 N. W. 17; *Schultz v. C., M. & St. P. R. Co.* 48 Wis. 375, 4 N. W. 399; *Karasich v. Hasbrouck,* 28 Wis. 569; *Baltzer v. C., M. & N. R. Co.* 89 Wis. 257, 60 N. W. 716; *Renne v. U. S. L. Co.* 107 Wis. 305, 83 N. W. 473; *Gray v. Commu-*

tator Co. 85 Minn. 463, 89 N. W. 322; *Newport News & M. V. R. Co. v. Campbell* (Ky.) 25 S. W. 267; *Ridenhour v. K. C. C. R. Co.* 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; *Mo. Pac. R. Co. v. Jones,* 75 Tex. 151, 12 S. W. 972; *Murtaugh v. N. Y. C. & H. R. R. Co.* 49 Hun, 456, 3 N. Y. Supp. 483; *Mo., K. & T. R. Co. v. Hauer* (Tex. Civ. App.) 33 S. W. 1010; *Bernier v. St. Paul G. L. Co.* 92 Minn. 214, 99 N. W. 778.

We find no reversible error in the record; therefore the judgment of the court below must be affirmed.

By the Court.—The judgment of the court below is affirmed.

LAUN, Appellant, vs. PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, Respondent.

April 10—April 30, 1907.

Life insurance: Illegal rebates of premium: Validity of policy: Recovery of premiums paid: Construction of statutes.

1. Under sec. 1955o, Stats. (1898)—prohibiting any life insurance company or agent from paying or allowing, "as an inducement to insurance, any rebate of premium . . . or any valuable consideration or inducement whatever not specified in the policy," and providing for revocation of the license of any company or agent violating the section,—the fact that a rebate of premium is paid or allowed (as provided for in a supplemental contract) does not render a policy of insurance itself either illegal or invalid, and after its delivery and acceptance premiums paid thereon cannot be recovered by the insured. *Urwan v. N. W. Nat. L. Ins. Co.* 125 Wis. 349, distinguished.

[2. Whether under said sec. 1955o a rebate of premium is legal if specified in the policy, not determined.]

3. Before pronouncing invalid a contract which is claimed to contravene a statute, a court should consider whether the statute expressly prohibits the contract, penalizing the act of making it and punishing all concerned, or, without express prohibition,

merely imposes a penalty upon one of the parties; the nature of the sanction, whether fine or imprisonment or civil forfeiture; whether the act in question is *malum in se* or merely *malum prohibitum;* whether it comes within the prohibitive words of the statute generally or only upon condition that certain formalities of evidence are omitted; the subject matter of the legislation and the effect upon innocent third persons of holding the contract void; whether to hold it void would not rather encourage than discourage violations of the statute; and what class of persons or interests the statute is intended to protect, and whether that protection would be defeated by holding the contract void.

APPEAL from an order of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a general demurrer to the complaint.

For the appellant there were briefs signed by *McGee & Jeger,* attorneys, and *Jackson B. Kemper,* of counsel, and oral argument by *Mr. Kemper, Mr. C. A. A. McGee,* and *Mr. L. M. Jeger.*

For the respondent there was a brief by *Winkler, Flanders, Bottum & Fawsett,* attorneys, and *Cratty Bros., Jarvis & Sample, Herbert J. Goudge,* and *James G. Flanders,* of counsel, and oral argument by *Mr. Goudge.*

TIMLIN, J. As shown by the complaint the Conservative Life Insurance Company was a life insurance corporation of California licensed to carry on its business in this state, and on or about May 20, 1902, it made with the plaintiff, a resident of this state, in this state a contract whereby it undertook to issue to the plaintiff a policy of insurance for $5,000 upon his life for an annual premium of $143.40 to be paid by the insured. The plaintiff was induced to assent to the receipt of this policy and the payment of said premium by means of an offer made by the insurance company to appoint the plaintiff one of a board of Local Advisers of said company for the state of Wisconsin, which board should in no event exceed 300 in

number and which appointment involved the doing of no actual work or labor on the part of the assured, but in consideration of the use of his name as one of said board of Local Advisers the assured would receive certain deductions and rebates from the amount of his annual premium to be paid to said insurance company, the amount of such deductions or rebates depending upon the number of Local Advisers to be appointed by said company in this state. Moved and induced by such representations, the plaintiff, on or about May 20, 1902, made application for a policy of insurance in the amount of $5,000 at an annual premium of $143.40 to be paid for a period of twenty years, and at the same time made application for his appointment as one of said local board, and at the same time paid the first premium of $143.40 on the policy. Consequently on May 28, 1902, there was delivered to the plaintiff a policy of life insurance as described, together with a paper entitled "Contract of Local Advisers—Limited to 300." This last purported to appoint the plaintiff a Local Adviser of said company subject to the insurance statutes and certain express provisions of the contract as follows:

"(1) The board of said Local Advisers appointed in the state of Wisconsin shall not exceed three hundred. (2) On the first day of February of each year during the continuance of this contract the company shall compute the number of thousands of insurance in force written for a period of ten years from and after February 1, 1902, in the state of Wisconsin, upon which there shall have been paid in cash during the preceding year one full annual premium, two semi-annual or four quarter-annual premiums. (3) The company further agrees on the dates aforesaid (February 1 in each year) to credit said Local Adviser with such a sum of money from the expense element of premiums paid on insurance written in said state during said period, after said date, as shall be obtained by dividing an amount of money equal to one dollar for each $1,000 of insurance in force at said dates, written during said period, after February 1, 1902, by the number of

said Local Advisers' contracts in force at the time of such distribution. The amount so credited to said Local Advisers shall each year on the anniversary of the date of this contract, or within thirty days thereafter, provided this contract be then in force, be paid to him by said Conservative Life Insurance Company, subject to the agreements of said Local Adviser in his application herefor. And said payment shall be in compensation for his services as Local Adviser and for no other consideration."

Thereafter, in pursuance of this agreement, upon said annual premium of $143.40 the plaintiff received for such alleged services on May 23, 1903, a rebate of $5.37, he paying only $138.03; on May 27, 1904, a rebate of $6.50, he paying only $136.90; on May 28, 1905, a rebate of $8.24, he paying only $135.16. These sums paid, together with the first full premium of $143.40, aggregating $553.49, make up the sum sought to be recovered in this action. It is averred that said policy of insurance and supplemental contract of Local Adviser constituted but a single contract, and constitute an agreement for rebate contrary to the laws of the state of Wisconsin, and that said contract of insurance so entered into between this plaintiff and said Conservative Life Insurance Company was and is wholly void and of no effect, and that said Conservative Life Insurance Company thereupon became and was indebted to the plaintiff in the said sum of $143.40 paid as aforesaid for the year beginning May 28, 1902, and the other items for 1903, 1904, and 1905 above mentioned.

It is then averred that on or about March 12, 1906, the defendant by agreement of consolidation with said Conservative Life Insurance Company took over and became possessed of all the assets of said Conservative Life Insurance Company, and in consequence thereof is obligated to and has assumed and agreed to pay and discharge all and singular the contracts, liabilities, and obligations of any name and nature of the said Conservative Life Insurance Company, and that upon its so

doing the Conservative Life Insurance Company and the defendant delivered to the plaintiff a certain contract under seal, which is annexed to the complaint and made part thereof, and which recites a consolidation of business between these companies and that the defendant has acquired the assets and business of the Conservative Life Insurance Company, and that the defendant, therefore, assumes and guarantees the fulfilment of all existing contracts and obligations of the Conservative Life Insurance Company. The complaint avers a demand upon the defendant for the return of the sums of money so paid to the Conservative Life Insurance Company and that the defendant neglects and refuses to return the same.

During the time covered by these transactions there was and now is in force in the state of Wisconsin sec. 1955*o*, Stats. (1898), as follows:

"No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates charged for life or endowment policies, or in the dividends or other benefits payable thereon or in any other of the terms and conditions of the contract it makes; nor shall any such company or any agent thereof make any contract or agreement as to such contract other than as plainly expressed in the policy issued pursuant thereto, nor pay or allow, or offer to pay or allow, as an inducement to insurance any rebate of premium payable on the policy or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy. Whenever it shall appear to the satisfaction of the commissioner of insurance, after a hearing before him upon notice, that any company, officer, agent, subagent, broker or solicitor has violated any provision of this section he shall revoke the license of any such company or person to transact business in this state, and no other license shall be issued to any such company or person within three years after such revocation."

This act is very like ch. 281, Pub. Laws of Maine for 1889, which was construed in the case of *State v. Schwarzschild,* 83 Me. 261, 22 Atl. 164, on April 6, 1891, a few days before its adoption in this state as ch. 267, Laws of 1891. The Maine statute is unlike ours in that it imposes a penalty by fine as well as the revocation of license. The case last cited construed ch. 281, Pub. Laws of Maine for 1889, to mean that the rebate of premium is not illegal if such rebate is specified in the policy. It is not necessary to determine in this cause whether this is the correct construction of our statute, and we express no opinion thereon.

Where a contract is expressly declared void by statute, or where the law declares the making of the contract a misdemeanor, or imposes a penalty upon the parties to the contract for the act of contracting, there is no doubt of the general rule of law that the courts will neither enforce that contract at the suit of one party, nor, if the contract has been executed, aid either party to recover back anything he may have paid thereon. *Clarke v. Lincoln L. Co.* 59 Wis. 655, 18 N. W. 492, and cases cited at page 658 (18 N. W. 493). Where the contract is declared void by statute, and the statute is within the power of the legislature to enact, there is not much room for discussion, although even then the whole purview of the statute may indicate that the word "void" is used in the sense of "voidable." *French L. Co. v. Theriault,* 107 Wis. 627, 83 N. W. 927. Where the statute does not expressly declare the contract void, but prohibits by penalty the making thereof, the courts infer a legislative intent that the contract shall be void, because to enforce the contract would practically set the statute at naught.

"But these rules do not obtain where the contract itself is not prohibited by law, but is declared to be void because not made or evidenced in the manner prescribed by law, or where the contract is declared void by law as to one party in order to protect the other against injustice or oppression. *Brandeis v.*

Neustadtl, 13 Wis. 142; *Tollensen v. Gunderson,* 1 Wis. 110; and *Thomas v. Sowards,* 25 Wis. 631, are cases of the first class. *Wood v. Lake,* 13 Wis. 84; *Gill v. Rice,* 13 Wis. 549; *Dole v. Northrop,* 19 Wis. 249; *Lee v. Peckham,* 17 Wis. 383; *First Nat. Bank v. Plankinton,* 27 Wis. 177, and many others that might be cited, are cases of the second class arising under the usury laws of this state." *Clarke v. Lincoln L. Co.* 59 Wis. 655, 661, 18 N. W. 495.

But if we assume as most favorable to the appellant that the undertaking of the respondent is comprehensive enough to include within its scope all liability of the Conservative Life Insurance Company to repay or refund moneys paid for premiums upon a void contract of life insurance, we will *in limine* meet the question whether or not the contract of insurance described in the complaint was void or voidable at the election of the insured under the statute above quoted. Only after arriving at a decision that the contract in question was void under the statutes of this state can the question of the equal delict of the plaintiff and the Conservative Life Insurance Company be considered. In determining this preliminary question there is always open for consideration, upon the terms of the statute, its subject matter, and the mischiefs it was intended to prevent, the question whether the legislative intention will be best subserved by holding the contract void. The plaintiff in this case contends that the contract to insure and the policy issued in execution of that contract were void because of the statute above quoted; hence the plaintiff could recover his premiums actually paid, from the company to which they were paid, and for that reason from this defendant, which took that company's assets and agreed to pay all its obligations. It may be well to review some cases cited by counsel as well as authorities not cited for the purpose of ascertaining what construction should be given to the statute in question in this particular.

In *Arnd v. Sjoblom, post,* p. 642, 111 N. W. 666, ch. 438,

Laws of 1903, which imposes a penalty equal to the amount of the note upon any person who takes a note for "any lightning rod, patent, patent right, stallion, or interest therein," but fails to write or print on said note in red ink that it was given for such consideration, is held not to make such note void in the hands of an innocent purchaser without notice of the fact that the note was given for such consideration. In *Union T. Co. v. Preston Nat. Bank,* 136 Mich. 460, 99 N. W. 399, where a check held by the plaintiff bank was certified by the officer of the defendant bank under such circumstances as to constitute a misdemeanor and subject the person certifying the check to a fine, the check was held valid in the hands of the plaintiff, an innocent holder. The court said:

"We think it not improper to infer that it was the legislative purpose to protect the interests of the stockholders and depositors of all banks and not merely the stockholders and depositors of particular banks whose officials might be guilty of criminal misconduct."

Irwin v. Curie, 171 N. Y. 409, 64 N. E. 161, was a case where the statute under consideration made it a misdemeanor for an attorney "to promise, give or procure to be promised or given a valuable consideration to any person as an inducement to placing or in consideration of having placed in his hands a demand of any kind for the purpose of bringing an action thereon," and the complaint was by a layman against an attorney on a contract covered by this statute. The statute was held no bar to the maintenance of the action. The court said:

"It will be observed that this statute does not provide that such a contract shall be wholly void, nor does it in terms purport to operate upon a layman who may be persuaded to procure business for an attorney because of the latter's promise to divide the profits with him. Its prohibition is directed against the attorney and counselor who is an officer of the court, and the very next section (75) provides that 'an attorney and counselor who violates either of the last two sec-

tions is guilty of a misdemeanor.' Here, again, we note that the penalty inflicted is upon the attorney and counselor alone, and not upon his accomplice or possibly intended victim."

Pennypacker v. Capital Ins. Co. 80 Iowa, 56, 45 N. W. 408, was a case where an Iowa insurance company, without having obtained license or permission so to do under the laws of Pennsylvania, insured against loss by fire real property in Pennsylvania. The statutes of the latter state forbade such insurance by an unauthorized or unlicensed insurance company and made the act of writing such insurance punishable by fine. In an action to recover for loss by fire upon a policy so written the defendant insurance company contended that the policy was void by reason of these statutes, but it was ruled that the contract of insurance was valid notwithstanding the statutes. The court said:

"The evident purpose of such a law is the protection of those paying for insurance upon property in that state. The prohibition and penalty is against the company only. No duty is required of the insured, and no act upon his part expressly prohibited. There is nothing in the law declaring what effect it shall have upon policies issued and accepted as this is alleged to have been."

Pangborn v. Westlake, 36 Iowa, 546, was a case where a statute forbade the sale of any lot in any town or addition until the plat thereof was acknowledged and recorded, and prohibited such sale by imposition of a forfeiture of $50 for each lot sold or disposed of. In considering whether a contract for the sale of a lot in a plat that had not been recorded was void on account of this statute the court said:

"We are therefore brought to the true test, which is that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if from all these it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly."

The Manistee, 5 Biss. 381, was a case where two insurance companies having had policies of insurance on the cargo of the schooner Robinson which was sunk and lost by collision with the steamer Manistee paid the loss and filed a libel against the Manistee to recover from it the amount paid. It was shown that one of these policies was issued at Chicago, Illinois, in violation of the statute of the state of Illinois which made the act of issuing such policy punishable by fine and imprisonment of the insurance agent issuing the policy. But it was ruled that the libelant could recover, the court saying:

"Where a statute is silent, and contains nothing from which the contrary can properly be inferred, a contract in contravention of it is void. But the whole statute must be examined in order to decide whether or not it does contain anything from which the contrary can be properly inferred. There is no penalty pronounced against a person for obtaining a policy from, or doing business with, the company that has not complied with the requirements of those statutes."

In *Watertown F. Ins. Co. v. Rust,* 40 Ill. App. 119, an insurance company foreign to Illinois issued a policy of fire insurance in Illinois on property in the latter state, in violation of a statute prescribing penalties upon any insurance company which should do so without a certificate of authority or license from the proper state officer, and in an action to recover for loss by fire under this policy the policy was held valid. The court said, among other things:

"In respect to the effect of prohibitory statutes upon agreements made in violation of them, the authorities make a clear distinction between those which are intended to regulate the conduct of the citizens generally and those intended to restrain one class for the protection of another."

This decision was affirmed on appeal in 141 Ill. 85, 30 N. E. 772, where the court said:

"Our statute was manifestly enacted for the protection of the public against the acts of irresponsible foreign insurance

companies. The duties it enjoins and the penalties it imposes are upon the insurance companies, and not upon those who in good faith contract with them."

In *Behler v. German Mut. F. Ins. Co.* 68 Ind. 347, under similar circumstances in an action against an insurance company on a policy of insurance against fire, the court said:

"To hold that a policy issued by a foreign insurance company to a citizen of this state, and premium notes made to them, were void for a noncompliance with our statute, would enable the foreign company to issue their policy, obtain what premiums they could, then avoid the policy by their own act. Such cannot be the fair intention of the statute."

In *Union Mut. L. Ins. Co. v. McMillen,* 24 Ohio St. 67, the action was upon a life insurance policy issued by an insurance company foreign to the state of Ohio in contravention of a statute of that state which imposed a penalty of $500 upon the insurance agent for the issue of each policy. The court held the policy valid, saying, among other things:

"The prohibition in the statute is against persons acting for companies that have not complied with the prescribed conditions. Such persons alone are made subject to the penalty. Whether the statute was meant to invalidate policies issued by companies in contravention of its provisions is to be determined from a consideration of the statute as a whole."

Walter A. Wood M. M. Co. v. Caldwell, 54 Ind. 270, was an action brought by a foreign corporation on a note where the defense was that the corporation had not complied with the requirements of the statute prohibiting the transaction of business within the state under penalty of fine and imprisonment. It was held that such failure operated as an abatement of the action and that the foreign corporation might thereafter qualify itself by compliance with the law. This involved a considerable examination into the effect of statutes of this nature upon contracts. In the opinion in the cause last cited, quoting from another Indiana case, speaking of the rule that where a statute forbids or penalizes the making of a contract

that contract will be held invalid whether the statute expressly declares it to be invalid or not, the court said:

"The rule is properly applied only where the reason upon which it is founded exists. 'The law ceases with the reason thereof,' and it is a grave error to regard it as a merely arbitrary rule, applicable to all contracts which are prohibited by statute. It is generally applicable because the thing prohibited is usually immoral, or against public policy."

In *Harris v. Runnels,* 12 How. 79, it is said:

"It is true that a statute containing a prohibition and a penalty makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void. . . . That legislators do not think the rule one of universal obligation, or that, upon grounds of public policy, it should always be applied, is very certain. For, in some statutes, it is said in terms that such contracts are void; in others, that they are not so. In one statute there is no prohibition expressed, and only a penalty; in another, there is prohibition and penalty, in some of which, contracts in violation of them are void or not, according to the subject matter and object of the statute; and there are other statutes in which there are penalties and prohibitions, in which contracts made in contravention of them will not be void, unless one of the parties to them practices a fraud upon the ignorance of the other. It must be obvious, from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined before courts should refuse to give aid to enforce contracts which are said to be in contravention of them."

Upon this general subject *Tate v. Comm. Bldg. Asso.* 97 Va. 74, 33 S. E. 382, speaks of the agreement before the court as follows:

"Its execution involved no moral turpitude. It was simply condemned by the law because contrary to the interests of

society. In such case the maxim, *in pari delicto,* is not inflexibly applied, but the court will consider whether public policy will be promoted and like agreements be discouraged by enforcing or avoiding the agreement, and, if the policy of the law will be advanced by granting relief, it will be given. 1 Pom. Eq. Jur. § 403; 2 id. § 941; 1 Story, Eq. Jur. § 298."

See, also, *Toledo T. & D. Co. v. Thomas,* 33 W. Va. 566, 11 S. E. 37. In the case last cited, as well as in some text-books, there seems to be a misunderstanding of the case of *Ætna Ins. Co. v. Harvey,* 11 Wis. 394. In that case, where the action was upon a note given for the premium on a certain policy of insurance in the face of a statute forbidding the taker of the note to transact business except on conditions there specified, which conditions were not complied with, the note was held void. Thus the policy of that statute as understood by the court was upheld and carried out. The same is true of *Presbyterian M. Fund v. Thomas,* 126 Wis. 281, 105 N. W. 801. In these cases the party prohibited and the party punishable by statute, the party upon whom restraint was placed for the protection of the class to which defendant belonged, sought to enforce an executory contract the making of which was forbidden by statute. There is no analogy between such cases and the case at bar.

In *Tracy v. Talmage,* 14 N. Y. 162, the action was upon the allowance of a claim against an insolvent banking association of which Talmage was receiver. This banking association was forbidden by statute to buy bonds for speculation and also forbidden to issue obligations payable at a future time. The basis of the claim presented was the negotiable obligations of the bankrupt payable on time given upon purchase of bonds of the state of Indiana which it bought for speculation. The claim was allowed. The common law on this subject from the earliest times was industriously examined with reference to the effect of statutes punishing one of the parties to a forbidden transaction, but containing no express declaration avoiding the contract and no mandate that the act itself was

unlawful, and the opinion concludes this investigation as follows:

"This case is the last of the class to which I shall refer, and I think it would be difficult to find a series of cases, running through almost a century, more uniform and consistent in tone and principle and in the distinctions upon which they are based. They have never, so far as I am aware, been overruled; and I know of no principle which would justify this court in disregarding them. The doctrine seems to me eminently reasonable and just, and I discover no principle of public policy to which it stands opposed. On the contrary, I concur in the sentiment which Judge WILDE in *White v. Franklin Bank,* 22 Pick. 181, expresses thus: 'To decide that this action cannot be maintained would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute by taking advantage of the unwary and of those who may have no actual knowledge of the existence of the prohibition, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank.' . . . The imposition of the penalties for a violation of the restraining law upon the corporation alone does not make it the guilty party, but it is simply evidence that the legislature so regarded it, and the reasons are equally strong for fixing the principal guilt upon the same party where its acts merely violate the principle of public policy."

In *Sacketts Harbor Bank v. Codd,* 18 N. Y. 240, the statute in question imposed a heavy penalty upon banks for receiving foreign bank notes at a rate of discount exceeding a quarter of one per cent. or uttering such notes as money. In answer to an action against a bank upon a bill of exchange it contended that the consideration of the bill was the sale by the plaintiff to the bank of foreign bank notes at a greater discount contrary to this statute, and therefore there could be no recovery, but the court held the contract valid, saying:

"The receiving bank, I assume, violates the statute because it exacts a greater discount than it is allowed to take. But is the customer also guilty? The answer to the question is

plain. The statute declares it to be unlawful for a bank or banker to *receive* foreign notes at greater rates, etc., and it prescribes a penalty of $1,000 for each offense. Stats. 1853, ch. 223, § 4; Stats. 1839, ch. 355, § 4. The language in which the offense is defined and the penalty declared evidently does not include the customer making the deposit or delivering the notes. No degree of guilt therefore attaches in any such case to any one except the corporation and its agents, or the individual banker receiving the notes at the prohibited rate of discount. The act, it must be borne in mind, involves in itself no moral turpitude. It is an offense because the statute declares it to be so, and for that reason alone. It is an offense, therefore, which has precisely the proportions the statute gives to it, and it can have no other or greater. The offense and the offender are both marked by the legislature, and the penalty is prescribed."

It cannot be profitable to pursue this line of investigation much further, but before leaving this branch of the subject it may not be inappropriate as an opinion upon the lack of moral turpitude in such transaction to cite *Quigg v. Coffy,* 18 R. I. 757, 30 Atl. 794, where a statute prohibited a life insurance company from making any distinction or discrimination as to premiums or rates charged for policies, etc., and imposed a penalty upon any life insurance company, or any officer or agent thereof, violating such provision, and the action was on a promissory note given in part payment for a rebated premium on a life insurance policy. The court said:

"The legal effect of the transaction, so far as it related to the company, was precisely the same as though the full premium on the policy had been collected by the plaintiff [the agent] and paid over to the company, and the company had then returned to the plaintiff his commission of fifty per cent. of the premium. The company in that event would have received the full amount of the premium to which it was entitled, as it has on the case before us. It has made no distinction or discrimination, which is prohibited by the statute, but has received the full amount which would have been received from any person insured in the same circumstances. It has

not, nor has any officer or agent of it, been guilty, therefore, of any violation of the statute. . . . There was nothing unlawful in this arrangement, and we fail to see why the agreement to furnish the names of persons to be insured was not a sufficient consideration for the retention by the defendant of half of the commission. The plaintiff [the agent] had a right, for aught that we can see, to make such a disposition of his share of the commission, or even to have given it to the defendant without consideration, if he had seen fit."

This examination might be greatly extended by following out the lines of precedents found in the cases above mentioned, but we believe it sufficiently appears that before a court can pronounce invalid a contract which is claimed to contravene a statute it must first consider the form of the statute to ascertain whether it expressly prohibits the contract, whether it penalizes the act of making the contract and punishes all those concerned therein, or whether, without expressly prohibiting the making of the contract, it imposes a penalty upon only one of the parties to the transaction; the nature of the sanction which the legislature has declared, that is, whether fine or imprisonment or civil forfeiture, must then be considered; then whether the act challenged is *malum prohibitum* or *malum in se;* whether it comes within the prohibitive words of the statute generally or only upon condition that certain formalities of evidence are omitted. The subject matter of the legislation must also be considered and the effect upon innocent third parties of holding the contract void. It is then considered whether to hold the resulting contract void would not rather encourage than discourage violations of the statute by allowing the guilty party who alone is subject to the sanction of the statute to profit by his breach of the law. And further the court should consider what class of persons or interests the statute is intended to protect, and whether that protection is defeated by holding the contract void. From all these considerations, aided by sound rules of interpretation wherever applicable, the court deduces and gives

effect to the legislative intention in this respect in all cases in which the statute has not expressly declared the contract to be void.

Let us now examine some of the consequences contended for by the appellant in this cause. A life insurance company may have contracts with thousands of persons for millions of dollars, and be found to have through its agents, with or without the knowledge of the officers of the company, granted rebates out of the agent's commission or out of the expense fund to many of its patrons. The act is *malum prohibitum* only. The legislature neither declared the insurance contract void nor made the act a misdemeanor, nor undertook to punish both parties to the transaction, nor undertook to add any sanction to the law against discrimination other than the forfeiture of license of the insurance company, or of the agent, to do business in this state. Can it be presumed under the authorities cited in this opinion that there was a legislative intention that the insurance company should retain all premiums and enrich itself by illegality through absolution from all liability on such policies? Can it be presumed that it was intended that all premiums that the insured might pay at any time within the period limited by law for the commencement of actions could be recovered back to the disadvantage of those insurers who conformed to law and paid the legal rates, by diminishing the annual surplus which should go to lessen their premiums, or by impairing the fund to which such law-abiding insurers must look for security? Would not this put a premium upon violations of this statute and enrich those concerned in such violations at the expense of the just man who kept the law? Were there nothing but these consequences apparent from the peculiar subject matter of the legislation in question, we might be warranted in inferring that the legislature intended no such consequences. But there are other indications in the statute itself of the same import. The peculiar penalty of the statute falls only upon one of the offend-

ing parties. *Sacketts Harbor Bank v. Codd,* 18 N. Y. 240. The insurance company or its agent is not by this statute punished as for a misdemeanor. The offender merely forfeits its license. The maxim, *expressio unius est exclusio alterius,* may well be applied to the statute in question in this particular. Or we might say, as was said in *Sacketts Harbor Bank v. Codd, supra:* "It is an offense, therefore, which has precisely the proportions the statute gives to it, and it can have no other or greater."

"A prohibitory statute may itself point out the consequences of its violation, and if, upon a consideration of the whole statute, it appears that the legislature intended to define such consequences and to exclude any other penalty or forfeiture than such as is declared in the statute itself, no other will be enforced." *Pratt v. Short,* 79 N. Y. 437, 445; *Duval v. Wellman,* 124 N. Y. 156, 26 N. E. 343.

We must hold that, considering the subject matter of this legislation, the relations of other nonoffending policy-holders to the corporation and its funds, and the particular consequences prescribed by the statute for its violation falling only upon one of the parties to the prohibited transaction, the contract of insurance itself is neither illegal nor invalid, and that the plaintiff received in consideration of his premiums paid from the Conservative Life Insurance Company a valid policy of life insurance, and consequently that he cannot recover back these premiums or any part thereof. Great stress is laid in the briefs and arguments upon the case of *Urwan v. N. W. Nat. L. Ins. Co.* 125 Wis. 349, 103 N. W. 1102. That was a case, however, where the contract to deliver a policy of life insurance was wholly executory, and while the contract was still executory the insured refused to receive the policy on the ground that it did not conform to the contract therefor, and upon the further ground that it was issued in violation of sec. 1955*o,* Stats. (1898). The latter was ample ground for refusal to receive it because the insured could not be com-

pelled to receive a policy in an insurance company whose license to do business in this state might be terminated by the very act of delivering this policy in consideration for a rebated premium. The language of that opinion must, like that of all opinions, be construed with reference to the questions before the court and the particular subject matter of discussion. So construing that opinion, there is nothing therein contained upon which the plaintiff can base any right to maintain the present action where the contract to insure was fully executed by delivery of the insurance policy, its retention for three years, and the payment of three annual premiums thereon.

By the Court.—The order of the circuit court is affirmed.

TIO, Appellant, vs. BROWN and others, Respondents.

April 10—April 30, 1907.

Judgment: Res judicata: *Void mortgage.*

A judgment, in an action to foreclose a mortgage, declaring the mortgage void because it wholly failed to describe any land, is *res judicata* in a subsequent action to reform and foreclose the same mortgage, brought against the same defendants by a transferee of the former plaintiff.

APPEAL from a judgment of the circuit court for Pierce county: E. W. HELMS, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *W. C. Owen,* and for the respondents *George W. Brown* and *Augusta Brown* on that of *E. B. Kinney.*

WINSLOW, J. This is an action to reform and foreclose a mortgage executed by the defendants *George W. Brown* and *Joseph L. Schallaire* to the plaintiff March 1, 1895. The de-

scription of the mortgaged premises contained in the mortgage was so indefinite and uncertain that it in fact described no property, and the complaint charged that this was the result of mistake by the scrivener, and it was sought to reform the mortgage by inserting a description of certain lands which it was claimed were intended to be mortgaged. It appeared upon the trial and was found by the court that in March, 1899, the plaintiff sold and assigned the mortgage in question to one Caroline Jessup, and that she thereafter brought an action to foreclose the same against the respondents *Brown* and others, in which action judgment was rendered declaring the mortgage void because it wholly failed to describe any real estate. It was further found that after rendition of this judgment Caroline Jessup sold and transferred the note and mortgage back to the plaintiff.

Thus it appears that in an action upon this same cause of action, brought by the plaintiff's grantor against the same defendants, a court of competent jurisdiction has held the mortgage in question void and incapable of enforcement. Whether the decision was right or wrong it is *res adjudicata* in another action between the same parties or their privies upon the same cause of action as to all matters which were litigated or might have been litigated in the former action. *Grunert v. Spalding,* 104 Wis. 193, 80 N. W. 589.

The court also found that there was no sufficient proof to show what particular premises were attempted to be mortgaged, and hence that there could be no reformation. As the former judgment is conclusive between the parties, we do not find it necessary to discuss the question whether the court was right on the last-mentioned proposition, although from our examination of the record we see no reason to doubt the correctness of the conclusion reached.

By the Court.—Judgment affirmed.

KING, Respondent, vs. APPLE RIVER POWER COMPANY and another, Appellants.

April 11—April 30, 1907.

Malicious prosecution: Probable cause: Court and jury: Advice of counsel: Diligence in ascertaining facts not necessary.

1. **In an action for malicious prosecution if the facts are undisputed the question whether there was probable cause for the prosecution is a question of law for the court.**
2. **If after a full, fair, and honest statement to a reputable attorney of all the facts and information within his knowledge a person takes the advice of such attorney in making a criminal complaint, honestly believing the one charged to be guilty, he has probable cause, as a matter of law, for his action.**
3. **The term "full and fair statement of all the facts" does not mean all the facts discoverable; nor is it necessary that diligence in making inquiries be shown.**

APPEAL from an order of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Reversed.*

The appeal is from an order granting a new trial in an action for malicious prosecution.

Defendants, according to the allegations of the complaint, maliciously and without probable cause swore out a warrant before a justice of the peace in St. Croix county, Wisconsin, falsely charging plaintiff with the offense of maliciously disturbing, interfering with, and injuring the wires and poles of the defendant company, used in its business of operating an electric power plant in such county, and procured plaintiff to be arrested on such warrant and imprisoned till she gave bail for her appearance to answer the complaint. Further, as alleged, plaintiff was duly tried upon such charge and acquitted. Other allegations were made as part of plaintiff's cause of action bearing on the question of damages.

Defendants answered, among other things, that the complaint was made in good faith, without malice, and with probable cause to believe plaintiff was guilty.

On the trial there was substantially undisputed evidence to this effect: Defendant *Epley* was president of the defendant company, which owned, controlled, and operated an electric power plant. The pole line was located along the highway in front of plaintiff's premises. In the latter part of November, 1904, her son, assuming to represent her and to be under the guidance of a lawyer, called upon *Epley* and demanded a removal of the poles from in front of his mother's place, threatening, if the demand was not complied with, to cut the poles down. No attention was paid to such demand. December 2d, thereafter, an employee of the company who had been in its service for several years and was regarded by it and by *Mr. Epley* to be trustworthy informed the latter by telephone that plaintiff's son was cutting the poles down and that he was acting under her direction. A short time afterwards *Epley* was informed a second time as before by one of the company's employees who said: "They are chopping the poles and the current is on." Thereupon *Epley* went to the office of a justice of the peace, who was a lawyer, and stated to him the situation. He suggested seeing Mr. McNally about the matter. The latter was a reputable lawyer of twenty years' experience and more. *Epley* related to Mr. McNally all the facts aforesaid, which were all that were within his knowledge. He believed plaintiff's son, under her direction, had actually disturbed the company's property, as he stated. On such statement Mr. McNally advised *Epley* that he was justified in making the complaint, and to do so was the only way to proceed. Thereupon McNally prepared the complaint and the warrant. They were taken to the justice of the peace, the complaint being duly sworn to and filed, and the warrant then issued and executed. The complaint charged both the plaintiff and her son with being guilty of unlawfully disturbing the company's property. Upon the hearing before the justice the plaintiff was discharged, but it was proved that her son actually did unlawfully disturb the company's property.

At the close of the evidence each of the defendants separately, and they jointly, by counsel, moved for the direction of a verdict. The motion was denied and the cause submitted to the jury for a special verdict, resulting in the following findings: (1) Defendant *Epley* in procuring the warrant to be issued did not act without probable cause. (2) Before commencing the criminal prosecution he made a full, fair, and honest statement of all the material facts known to him bearing upon the question of plaintiff's guilt of the offense alleged against her to W. F. McNally for the purpose of procuring his legal advice thereon. (3) Said McNally honestly and in good faith advised *Epley* that upon the facts so stated to him plaintiff was guilty of the offense for which she was arrested. (4) *Epley* at the time he swore to the complaint did not have knowledge or information such as would lead a man of ordinary prudence and caution to believe plaintiff was guilty of the offense charged. (5) *Epley,* before he swore to the complaint, did not use the same prudence and caution an ordinarily prudent and cautious man would have exercised in ascertaining the facts concerning the commission of the crime charged. (6) He sincerely and in good faith believed when he swore to the complaint that plaintiff was guilty of the offense charged. (7) He swore to the complaint in good faith and without malice against the plaintiff. (8) Plaintiff suffered actual damages by reason of her arrest in the sum of $1,000. (9) We do not assess any exemplary damages to be recovered by plaintiff in case she is entitled to judgment.

The defendants moved for judgment on the verdict and plaintiff moved for an order setting the same aside and for a new trial. The former was denied and the latter granted upon the ground that the answers were inconsistent and that error was committed in the instructions; the error supposed to have been so committed not being specified. The defendants appeal.

W. F. McNally, for the appellants.

For the respondent there was a brief by *J. A. Frear* and *A. J. Kinney,* and oral argument by *Mr. Kinney.* They contended, *inter alia,* that if his statement of facts is made on information furnished by others, good faith may require that the person seeking advice should have made investigation as to the sources of his informant's knowledge and the grounds of his belief, and supplemented and verified such information by such further investigation as ordinary caution and prudence demand. *Blunk v. A., T. & S. F. R. Co.* 38 Fed. 311; *Galloway v. Stewart,* 49 Ind. 156; *Flora v. Russell,* 138 Ind. 153, 37 N. E. 593; *Ahrens & Ott Mfg. Co. v. Hoeher,* 106 Ky. 692, 51 S. W. 194; *Atchison, T. & S. F. R. Co. v. Brown,* 57 Kan. 785, 48 Pac. 31; *Anderson v. Columbia F. & T. Co.* (Ky.) 50 S. W. 40; *Hurlbut v. Boaz,* 4 Tex. Civ. App. 371, 23 S. W. 446. Where the defense of advice of counsel is interposed, and the good faith of the prosecutor is disputed, the question is for the jury, even though it is not very plain what the precise element of doubt is. *Connery v. Manning,* 163 Mass. 44, 39 N. E. 558. The court rightly submitted to the jury the question whether *Epley* believed the plaintiff guilty and whether such belief was properly founded. *Eggett v. Allen,* 119 Wis. 625; *Billingsley v. Maas,* 93 Wis. 176, 180; *Hutchinson v. Wenzel,* 155 Ind. 49, 56 N. E. 845. On the question of probable cause, it was for the jury to say whether *Epley* had made such inquiry and investigation as a reasonably prudent and cautious man would have made under the circumstances. *Boyd v. Mendenhall,* 53 Minn. 274, 55 N. W. 45; *Tabert v. Cooley,* 46 Minn. 366, 49 N. W. 124; *Stubbs v. Mulholland,* 168 Mo. 47, 67 S. W. 650, 659; *Blunk v. A., T. & S. F. R. Co.* 38 Fed. 311; *Bechel v. Pac. Exp. Co.* 65 Neb. 826, 91 N. W. 853.

MARSHALL, J. Whether there was probable cause in a case of this sort is solely a question of law for the court where the facts are undisputed. The province of the jury is to deal

with the controversy as to facts where there is a dispute in that respect, but such controversy being settled the ultimate question is for the court. *Stewart v. Sonneborn,* 98 U. S. 187.

Generally speaking, in order for a person to have probable cause to believe another guilty of a crime warranting institution of proceedings for his punishment, such person must have such knowledge or information as would lead an ordinarily prudent man to such belief, and it is ordinarily a question of fact for the jury under the circumstances of the given case as to whether there was such knowledge. But it is a settled rule of law that if a person takes the advice of reputable counsel in making the complaint, honestly believing the one charged to be guilty, he has probable cause as a matter of law for his action, or in other words his conduct is consistent with that of a man of ordinary prudence, if the advice of counsel is based upon a full, fair, and honest statement of all the facts and information within such person's knowledge.

In this case the court submitted to the jury by the first question whether defendant *Epley* was possessed of such knowledge and information as would produce an honest belief in the mind of an ordinarily prudent man that the respondent was guilty; the form of the question being such as to require the jury to find whether there was probable cause or not under the legal test suggested, and the answer was, in effect, in the affirmative, though by the form of the question the jury were compelled to express the finding in a negative form; the language of the question being: "Did the defendant *F. W. Epley,* in procuring the warrant in question to be issued, act without probable cause for so doing?"

The court instructed the jury that in order to warrant them in finding that *Epley* did not act without probable cause they must find that he had knowledge and information such as would have caused an ordinarily prudent person to believe the persons charged to be guilty. In the fourth and fifth ques-

tions the legal test given to enable the jury to properly answer the first interrogatory was embodied to be found as matter of fact. The result of thus doubly placing the subject before the jury was that they found probable cause in answer to the first question, and, in effect, want of probable cause later. Manifestly, if the fourth and fifth findings, embodying as aforesaid the instruction given as to the first question, have any materiality in the verdict, in view of the evidence and other findings, the court did right in setting it aside for inconsistency and granting a new trial.

We are unable to discover any difficulty in the verdict other than the one referred to, unless it be in that the jury found that *Epley* in swearing out the warrant acted in good faith under the advice of reputable counsel given after a full, fair, and honest statement to him of all the facts within his knowledge in respect to the transaction. There is no serious difficulty at that point if the findings on the subject covered all the matters essential in law to probable cause, and the fourth and fifth questions were erroneously submitted and answered upon the theory that notwithstanding such matters *Epley* might yet not have acted consistently with the conduct of an ordinarily prudent man.

It seems that findings 2, 3, 6, and 7 are in accordance with the undisputed evidence. As indicated in the statement, the evidence is substantially uncontroverted that *Epley* stated all the facts within his knowledge with the source of his information to a reputable lawyer of large experience, whom he had every reason to believe would advise him properly, and that he made such statement for the purpose of having respondent and her son dealt with according to law; that he was advised by such attorney after such statement to do as he did, and that he followed such advice sincerely and honestly believing the respondent to be guilty as charged. We see nothing in the record to indicate but what the court might well have found those facts without the aid of the jury.

The theory of counsel for respondent is that the findings referred to are not sufficient as matter of law to show probable cause, in that a full, fair, and honest statement to reputable counsel of all the facts and information within *Epley's* knowledge was not sufficient unless grounded on such an investigation as to satisfy the standard of ordinary prudence under the circumstances; the advice of counsel not being the test. On that matter it is conceded, as the fact is, that there is considerable confusion in judicial expressions, some holding that the advice of counsel covers the subject of whether the statement is based upon adequate knowledge and information as well as the subject of whether upon the facts and information disclosed a cause of action probably exists, and others holding to the contrary. It does not seem advisable to review the numerous adjudications that can be found bearing on the matter and endeavor to reconcile them, or to demonstrate which side of the conflict is supported by the weight of authority, since this court has spoken plainly in respect to the matter, laying down the rule regarded upon careful consideration to be the sound one.

It is stated in the text-books that an ordinarily prudent man is expected to take the advice of a person learned in the law and a reputable member of the profession before instituting a criminal prosecution, and if he does so, placing all the facts before his counsel, and acts honestly upon his opinion, such facts constitute probable cause as a matter of law. Cooley, Torts (2d ed.) 212. That was adopted here in *Sutton v. McConnell,* 46 Wis. 269, 50 N. W. 414, and affirmed in *Billingsley v. Maas,* 93 Wis. 176, 181, 67 N. W. 49. That is the doctrine of the federal supreme court. *Stewart v. Sonneborn,* 98 U. S. 187.

The term "full and fair statement of all the facts" does not mean all the facts discoverable, but all the facts within the knowledge of the person making the statement. If he knows facts enough, either personally or by credible information,

which, when fairly and fully stated to reputable counsel for the purpose of obtaining legal guidance, results in advice which is honestly followed in commencing the criminal proceedings, that is sufficient. That was distinctly recognized in the most recent decision of this court on the subject, *Brinsley v. Schulz,* 124 Wis. 426, 102 N. W. 918. There it was said:

"One of the most efficient ways of negativing a *prima facie* showing in that regard and establishing affirmatively probable cause is to prove that the prosecution was commenced under the advice of counsel, . . . after a full statement to him of all the facts known to the defendant. It makes no difference in such a case whether the facts supposed to exist do so or not; if there is an honest belief in such existence and the supposed facts are fully and fairly stated to counsel to obtain proper guidance in the matter, and upon his advice as to the sufficiency of the same the prosecution is in good faith commenced, that is enough. Such circumstances when fully established show, as a matter of law, absence of malice and presence of probable cause, precluding any liability for malicious prosecution."

That is laid down as elementary in 19 Am. & Eng. Ency. of Law (2d ed.) at page 661, in these words, supported by numerous authorities:

"The rule is undoubted that it is not necessary, in order to constitute probable cause for a prosecution, that the party instituting it should have acted on his own personal knowledge of the facts. If the prosecutor has acted in good faith, upon credible information received from reliable sources, he will not be liable."

In harmony with that this court in *Messman v. Ihlenfeldt,* 89 Wis. 585, 62 N. W. 522, said, substantially, if the prosecutor fairly imparted to counsel all the knowledge of the facts he possessed, and honestly followed such counsel's advice, then such advice is a complete defense. It stands for probable cause because it shows that he acted honestly. Whether there was in any given case a full and fair state-

ment of all the prosecutor's knowledge to reputable counsel, if the matter be disputed, is for the jury, but the facts appearing uncontroverted, or found by the jury, the legal result follows as a matter of course.

The real basis for the doctrine that the advice of counsel under the circumstances stated stands for probable cause is that it covers the subject of whether the statement made is sufficient without further investigation as to the facts. Counsel is supposed to pass upon that question, and his advice honestly given and honestly acted upon to preclude any successful claims of negligence or imprudence on the part of the prosecutor as held in the cases cited to our attention by the learned counsel for appellant and others. *Johnson v. Miller,* 69 Iowa, 562, 29 N. W. 743; *Dunlap v. New Zealand F. & M. Ins. Co.* 109 Cal. 365, 42 Pac. 29; *Holliday v. Holliday,* 123 Cal. 26, 55 Pac. 703; *Gillispie v. Stafford,* 96 N. W. 1039, 4 Neb. (Unof.) 873; *Hess v. Oregon B. Co.* 31 Oreg. 503, 49 Pac. 803.

The conflict as to whether the statement to counsel of facts known to the prosecutor, either personally or by credible information, is sufficient in order that he may be shielded from liability if he honestly follows counsel's advice, is recognized with citations of authority on both sides of the controversy in 19 Am. & Eng. Ency. of Law (2d ed.) 688, where it is said:

"A number of cases hold that a failure to make a full disclosure of all material facts will render the defense of advice by counsel inoperative unless the defendant shows that not only were all known facts communicated, but also all such as reasonable diligence in making inquiries would have discovered. Other authorities, however, declare that it is not necessary that diligence in making inquiries should be shown, provided facts within defendant's knowledge, or in the existence of which he had reasonable ground to believe, were communicated to counsel in good faith."

As we have seen, our court, contrary to the contention of counsel for respondent, is committed to the doctrine last stated.

It follows necessarily, not only from the undisputed evidence but from the verdict, that defendants were entitled to judgment. It was not proper for the jury to say that the advice of counsel, under the circumstances proved and found, was not sufficient to warrant *Epley* as a man of ordinary prudence in commencing the prosecution of respondent, because as a matter of law the contrary is the fact.

What has been said renders it unnecessary to discuss any other questions than those referred to. Defendants were entitled to judgment. The jury evidently did not intend to find anything inconsistent with the second, third, and sixth findings. They were misled by the way the case was submitted into the belief that such findings did not necessarily make out a course of action consistent with ordinary prudence.

By the Court.—The order is reversed, and the cause remanded for further proceedings in accordance with this opinion.

TIMLIN, J., dissents.

WIGER and another, Respondents, vs. CARR, Appellant.

April 11—April 30, 1907.

Statute of frauds: Oral authority to purchase property: Brokers: Rescission of contract: Conversion.

1. An oral agreement authorizing one as agent to purchase property for another from a third person is not within the statute of frauds—sec. 2308, Stats. (1898)—relating to contracts for the "sale of goods," etc.
2. Where plaintiffs had placed money in defendant's hands to pay in part for property to be purchased for them, and defendant, relying thereon, had bound himself to take and pay for the property, plaintiffs could not cancel or rescind their agreement, and defendant had the right to use the money in paying for the property.

APPEAL from a judgment of the circuit court for St. Croix county: E. RAY STEVENS, Judge. *Reversed.*

On January 5, 1905, the plaintiffs placed in the hands of the defendant a certificate of deposit for $8,000 and received from him the following:

"Received from *R. N. Jenson* and *C. N. Wiger* cer. of deposit No. 14405 for $8,000 to be used in payment of $8,000 par value of stock to be purchased from F. H. Welcome. It being agreed that balance of purchase above par to be paid by *C. N. Wiger* and *R. N. Jenson* when stock is delivered. It is contemplated stock will be ready for delivery on or about Jany. 10, 1905. Said certificate of deposit to be held by me until delivery of shares of said stock.

"January 5, 1905. F. J. CARR."

Upon same day defendant agreed with one Regan to be personally responsible for eighty shares out of 140 shares of stock held by Welcome, whereupon Regan purchased the whole of said 140 shares and paid therefor, holding the same untransferred on the books of the corporation. On January 10th, which was the date of the annual stockholders' meeting, the plaintiffs expressed a desire that *Jenson* should become a director and president of the bank and that *Wiger* should become a director. To this the defendant, who was also a stockholder and director, made no objection, but, upon consulting other stockholders, it was found that a majority were unwilling that *Mr. Wiger* should be a director, he being cashier of another and competing bank, and thereupon the plaintiffs declared to the defendant that they did not want the stock, and requested a return of the certificate of deposit, to which request he did not assent.

Thereafter a certificate for the eighty shares of stock was issued to the defendant, who paid therefor, and on January 23d notified the plaintiffs that he desired to deliver the stock to them and receive the balance of its purchase price, approximately $2,500, to which *Jenson* replied January 24th, demanding a return of the certificate, and on February 2d

wrote again, stating that the terms of agreement under which the certificate had been placed in defendant's hands had never been complied with; that the latter had represented that the premium was not to exceed $2,300; that the deal was declared off on January 10th; and that, as he (*Jenson*) was informed, defendant never purchased any bank stock from Welcome. Thereafter, in April or May, the defendant, in satisfaction of his own obligation which he had given for the stock, cashed the certificate of deposit and applied it thereon.

The plaintiffs brought suit asserting conversion of said certificate, both in rejecting their demand for its return and cashing and converting the proceeds thereof. The court made certain findings, the gist of which was to the effect that on January 10th, before defendant had executed any note or writing of any kind with reference to the purchase of said stock, before he had paid any part of the purchase price thereof, and before any of the stock had passed to his possession, the plaintiffs revoked his authority to purchase said stock and demanded a return of the certificate, upon which findings of fact a conclusion of law in favor of plaintiffs' right of recovery was predicated, accompanied by an opinion to the effect that such conclusion resulted from the view that defendant's agreement with Regan was avoided by the statute of frauds. From judgment entered in plaintiffs' favor the defendant appeals.

W. F. McNally, for the appellant.

F. M. White, for the respondents.

DODGE, J. The ground of the trial court's decision was that the transaction between defendant and Regan amounted to an agreement for the purchase of stock which, by the statute of frauds, was void, there being neither written memorandum thereof, payment of any part of price, nor delivery of any of the property up to the time when plaintiffs revoked defendant's authority to acquire stock for them. *Spear v.*

Bach, 82 Wis. 192, 52 N. W. 97. That transaction, summarized, was as follows: Welcome had 140 shares of stock and evidently did not desire to sell piecemeal. He was, morally at least, obligated to Regan not to sell without the latter's consent or approval. Regan wanted to know or control the holding of part or all of such stock. He was willing that *Carr* should have the eighty shares for these plaintiffs, if, at the same time, the other sixty shares could go into satisfactory hands. In this situation, a few days before January 5th, *Carr* proposed that Regan buy the whole 140 shares, sixty for himself and eighty for *Carr,* to be passed to plaintiffs if they should so authorize, which up to that time they had not done. Regan thereupon negotiated with Welcome and obtained definite terms upon which he could buy and reported to *Carr,* who, after obtaining plaintiffs' consent and their $8,000 certificate of deposit, returned to Regan on January 5th and definitely authorized him to purchase the eighty shares of stock for him (*Carr*), which Regan thereupon immediately did, receiving a transfer of the whole 140 shares from Welcome and paying for it. We deem it entirely clear that, as between *Carr* and Regan, this was no contract to purchase by the former from the latter, but a contract of agency authorizing the latter to purchase from Welcome for the former. Regan at no time prior to that definite authorization owned the stock. It was still the property of Welcome, and might well have so remained but for the direction to Regan to purchase it for *Carr.* Such a transaction is not within the statute relating to contracts for the "sale of goods," etc. Sec. 2308, Stats. (1898); *Hatch v. McBrien,* 83 Mich. 159, 47 N. W. 214; *Frank v. Murray,* 7 Mont. 4, 14 Pac. 654; *Bird v. Muhlinbrink,* 1 Rich. Law (S. C.) 199, 44 Am. Dec. 247; *Stover v. Flack,* 41 Barb. 162; *Kutz v. Fleisher,* 67 Cal. 93, 7 Pac. 195. The distinction involved in the employment of one as agent to obtain for the principal something which he has not is in close analogy to that in an em-

ployment to manufacture for another that which at the time of contracting has no existence. *Meincke v. Falk,* 55 Wis. 427, 13 N. W. 545; *Gross v. Heckert,* 120 Wis. 314, 97 N. W. 952. Of course, in the purchase by Regan from Welcome on January 5th the statute was fully satisfied by delivery of the property sold and payment of the purchase price.

Owing to the view taken by the trial court as to applicability of the statute of frauds, there is no express finding as to whether defendant, prior to plaintiffs' notification that they did not want the stock, entered into an oral obligation or promise to Regan to take and pay for eighty shares of the stock which the latter bought of Welcome. The finding is merely that no writing was executed till afterward. The evidence of defendant himself is, however, direct and undisputed that on January 5th, before Regan consummated purchase from Welcome and as basis therefor, he promised to be personally responsible for the eighty shares which the court finds were to be acquired by Regan from Welcome for these plaintiffs. Their attempted withdrawal from their contract was on January 10th. We conclude, therefore, that such oral promise is established. The legal result of the situation as arising is too clear for much discussion. Plaintiffs had agreed that defendant might use the money placed in his hands to pay for this stock. Relying thereon, the latter had bound himself to pay a sum of money. It was then too late to cancel or rescind the contract, for defendant could not be placed *in statu quo.* Analogous situations involving the same principle are numerous. *Chappel v. Cady,* 10 Wis. 111; *Saveland v. Green,* 36 Wis. 612; *Green v. Feil,* 41 Wis. 620; *Hess v. Rau,* 95 N. Y. 359; *Terwilliger v. O., C. & S. R. Co.* 149 N. Y. 86, 92, 43 N. E. 432; *Goodwin v. Bowden,* 54 Me. 424. Escape from the foregoing conclusion is sought by respondents upon certain detailed grounds which were not passed upon by the court below because unnecessary in the light of its conclusion. Some of these are as follows:

It is contended that the defendant was limited to a price

of $116 per share of stock while he paid about $118. The evidence is somewhat conflicting and not very definite upon either side. The written contract indicates that the price was to be more than par, but was not definitely fixed. The defendant's evidence is to the effect that he told the plaintiffs that he would be able to get the stock on a basis of a premium of sixteen per cent. plus such undivided earnings as the unbalanced books of the bank would show at the annual meeting, which proved to be such as to warrant the price in fact paid. One of the plaintiffs states $116 per share as the estimated price without such addition, and the other concedes that such addition was spoken of as indefinite but unlikely to amount to more than a trifle. In the light of all the evidence we are persuaded that there was no limit fixed excluding authority to buy the stock at the price of $118 per share. We fail to find support in the evidence for the respondents' contention that defendant's agreement with Regan for the stock was subject to any limitation as to the proportion in which it should be distributed between the plaintiffs.

A contention is made that the agreement between defendant and Regan, upon which rested the former's obligation to pay for the stock, was canceled or released by Regan on January 10th because, when *Jenson* said that the plaintiffs did not desire the stock unless *Wiger* could be a director, Regan responded, "We'll call this deal off, then, and I will hold the stock in the meantime." This was not said to the defendant, and there is no evidence that he was in such proximity to the parties as to have heard it so as in any way to become a party thereto or acquire any right to repudiate or resist his agreement to pay Regan. We cannot think that there is enough in this remark, upon which no action seems to have been based, to establish that *Carr* was, to his knowledge, released from his obligation, even conceding that in such event he would not be entitled to use the plaintiffs' money in his hands for the purpose of paying for the stock.

We conclude that the evidence discloses a situation in

which the defendant might have been compelled to take and pay for the stock, and that he had the right to use the $8,000 placed in his hands by plaintiffs for that purpose, so that he is not liable for conversion thereof in so doing.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for defendant.

PLANO MANUFACTURING COMPANY, Appellant, vs. KINDSCHI and others, Respondents.

April 12—April 30, 1907.

Partition of land: Parties: Life tenants.

1. Under sec. 3101, Stats. (1898), a tenant in common of a life estate in land may maintain an action for partition thereof; and under sec. 3102 the owners of the reversion are proper parties to such action.
2. Under our statutes relating to partition of land a cotenant of a life estate can have partition of that estate only and not of the fee or reversion.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an appeal from a judgment dismissing the plaintiff's complaint with costs. The complaint alleges, substantially, that the plaintiff was authorized to do business in Wisconsin, and the defendants are interested in the land in question; that the interest of defendant *Anna Kindschi* and Wanda E. Thomas is limited to that of dower right of their respective husbands; that the estate of the parties to this action arose as follows: The real estate hereinafter described was possessed in fee simple by Martha Kindschi, and she died while such owner; that at the time of her death she left, her surviving, Christian Kindschi, her husband, and four children, *Edwin E. Kindschi, Margaret Kindschi, Dora*

Kindschi, and *Kate Kindschi,* defendants named herein; that prior to the commencement of this action the plaintiff, *Plano Manufacturing Company,* obtained a judgment against Christian Kindschi and docketed the same, and thereafter the interest of Christian Kindschi in the real estate in question was sold on sheriff's sale to the plaintiff, and plaintiff became entitled to the possession of the estate of Christian Kindschi in such real estate; that before the commencement of this action and for a valuable consideration plaintiff sold and transferred a one-third interest in said real estate to defendant H. H. Thomas, and Wanda E. Thomas is the wife of H. H. Thomas; that the real estate in question consists of about one acre of land in the village of Prairie du Sac, Sauk county, Wisconsin, described in a deed recorded in the office of the register of deeds in Sauk county, Wisconsin (vol. 54 of Deeds, p. 341); that the defendants, children of Martha Kindschi, namely, *Edwin, Margaret, Dora,* and *Kate Kindschi,* are the owners each of a one-fourth interest in the fee simple in the real estate in question, subject to the right of the plaintiff and defendant H. H. Thomas; that plaintiff and defendant H. H. Thomas have an estate in possession and each is entitled to an undivided portion of said real estate.

The complaint further alleges that the real estate is so situated and the buildings thereon are so constructed that it will be impossible to divide the same; that it is inadvisable and inexpedient to plat the same or attempt to plat the property, and it will be impossible and inexpedient to divide it among the various parties entitled thereto; that an attempt to do so will result in depreciation of the value of the whole estate; and that it will be necessary to sell the property and divide the proceeds in manner prescribed by law. The complaint prays for partition and sale of the real estate in question according to the rights of the parties interested and that the plaintiff be allowed costs and disbursements, and that the court direct the balance to be paid to the children and parties

named in the action according to law, equity, and good conscience.

The defendants *Edwin E. Kindschi, Margaret Kindschi, Dora Hanks (née Kindschi)*, and *Kate Kindschi* answered, admitting that they are heirs of Martha Kindschi, deceased, and denying that the plaintiff or defendant H. H. Thomas has any right, title, or interest, joint or otherwise, in the property in question. The answer further alleges that the property in question is, and for many years last past has been, in an untenantable condition and so out of repair as to be an annual expense; that it is not self-supporting, and the earnings of said estate not sufficient to pay the annual taxes and unavoidable expenses of repair. The answer further alleges that the interests of Christian Kindschi, the *Plano Company*, H. H. Thomas, and Wanda E. Thomas, if any interest they have, are indebted to the defendant *Edwin E. Kindschi* in a sum exceeding $250 as improvements necessary and advances for and on behalf of said estate; that the sale by the plaintiff of a part of its estate by the curtesy to defendant Thomas was made in collusion and for the purpose of depriving defendant *Edwin E. Kindschi* and the heirs to said property of their just share and interest therein; and defendants denied generally other allegations of the complaint.

The defendants also answered setting up a counterclaim. The plaintiff replied to the counterclaim, denying all the material allegations thereof. The court sustained an objection to any evidence under the complaint, and granted plaintiff twenty days to serve an amended complaint on payment of $10 costs, and thereafter, upon failure to amend, judgment was rendered in favor of the defendants and against the plaintiff, dismissing the plaintiff's complaint with costs, from which this appeal was taken.

For the appellant the cause was submitted on the brief of *Grotophorst, Evans & Thomas.* They contended, *inter alia,*

that partition suits are equitable in their nature and the courts have power to do justice to all the parties and protect all the estates that go to make up the fee simple. *Pulse v. Osborn,* 30 Ind. App. 631, 64 N. E. 61; *Hanson v. Hanson* (Neb.) 97 N. W. 23; *Walker v. Williams,* 84 Miss. 392, 36 South. 450; *Bennett v. Bennett,* 84 Miss. 493, 36 South. 452; *Deery v. McClintock,* 31 Wis. 195, 202. The only limitation upon the power of the court to direct the sale of the fee is that contained in sec. 3117, Stats. (1898). See *Deery v. McClintock,* 31 Wis. 195, 202; *Jenkins v. Fahey,* 73 N. Y. 355; *Hanson v. Ingwaldson,* 77 Minn. 533, 80 N. W. 702, 704. In view of the manifest injustice which would otherwise result, and in view of the express provision of our statute making but a single exception (sec. 3117), this court should authorize a sale of the fee simple in case an actual division of the real estate is impossible. *Shaw v. Beers,* 84 Ind. 528; *Fitts v. Craddock,* 144 Ala. 437, 39 South. 506; *Gayle v. Johnston,* 80 Ala. 395.

For the respondents there was a brief by *Bentley & Kelley,* and oral argument by *J. M. Kelley.*

KERWIN, J. The complaint shows that the plaintiff and defendant H. H. Thomas were at the time the action was commenced tenants in common of the life estate. The answering defendants are owners of the reversion and deny the right of the plaintiff to partition, and further deny that plaintiff is entitled to sale of the fee or reversionary interest in the property, and further insist that they are improper parties defendant and that the court below properly dismissed the complaint. The statute expressly regulates the subject and provides that joint tenants or tenants in common may have partition, and that such action may be maintained by any person who has an estate in possession, but not by one who has only an estate in remainder or reversion. Sec. 3101, Stats. (1898). It further provides that every person having

an interest in the premises may be made a party defendant. Sec. 3102, Stats. (1898). So it is clear from the express provisions of the statutes that all persons having an interest in reversion are proper parties defendant. There can be no doubt that the plaintiff and defendant H. H. Thomas were entitled to partition of the life estate. Sec. 3101, Stats. (1898); *Pabst B. Co. v. Melms,* 105 Wis. 441, 81 N. W. 882; *Ullrich v. Ullrich,* 123 Wis. 176, 101 N. W. 376; *Hinman v. Hinman,* 126 Wis. 191, 105 N. W. 788; Freeman, Cotenancy & Partition, § 440. It is also clear that the owners of the reversion were proper parties defendant in the action for partition of the life estate. Sec. 3102, Stats. (1898); *Morse v. Stockman,* 65 Wis. 36, 26 N. W. 176. The court below, therefore, erred in dismissing the plaintiff's complaint on the objection of the answering defendants.

But we are asked further to determine upon this appeal whether, in an action for partition by a life tenant, where the reversioners are defendants, their interests may be sold and partition made of the whole estate in the land, including the fee held by owners of the reversion. It is insisted that the plaintiffs in this action are entitled to partition not only of the life estate, but of the fee or reversion as well. We think the statute heretofore cited clearly excludes such right. Sec. 3101, Stats. (1898). Counsel for appellant present an able argument on this question and cite many authorities which appear to give some support to the general contention made by appellant upon this question; but a careful examination of the authorities cited convinces us that they are not controlling, as they are quite different in their facts, and moreover are based upon statutes different from ours. We are satisfied that under our statutes relating to partition a life tenant can only have partition of the life estate. Freeman, Cotenancy & Partition, § 440; *Aydlett v. Pendleton,* 111 N. C. 28, 16 S. E. 8, 32 Am. St. Rep. 776 and note; *Seiders v. Giles,* 141 Pa. St. 93, 21 Atl. 514; *Metcalfe v. Miller,* 96 Mich. 459, 56 N. W. 16; *Simmons v. MacAdaras,*

6 Mo. App. 297; *Parks v. Siler,* 76 N. C. 191; *Hodgkinson et ux., Petitioners,* 12 Pick. 374; *Pabst B. Co. v. Melms,* 105 Wis. 441, 81 N. W. 882.

We regard further discussion unnecessary. We hold that upon the case made by the complaint the plaintiff is entitled to partition of the life estate only; that the answering defendants are proper parties defendant; and that the court below should not have dismissed the complaint.

By the Court.—The judgment of the court below is reversed, and the action remanded for a new trial.

W. H. KIBLINGER COMPANY, Appellant, vs. SAUK BANK, Respondent.

SAME, Respondent, vs. SAME, Appellant.

April 12—April 30, 1907.

Action, tort or contract? Pleading: Foreign corporations doing business in state: Breach of contract to return note sent for collection: Damages: Costs.

1. A complaint alleging an agreement by defendant bank to present a note for payment and in case of its nonpayment to return it to plaintiff on a certain date, and that defendant "failed and neglected to do so," is *held* a complaint on contract and not one for negligent omission of duty imposed by law.
2. A complaint showing merely that plaintiff, a foreign corporation, sent a note to defendant bank in this state for collection, with instructions to return it if not paid by a certain date, does not show plaintiff to have been an unlicensed corporation doing business in this state, so as to render the complaint demurrable.
3. In an action for breach of contract in failing to return a note to plaintiff at a certain time, the evidence—showing, among other things, that plaintiff had thereafter exhausted the resources of the maker of the note in the collection of later demands against him—is *held* to sustain a finding by the jury that there was no reasonable probability that the maker would have paid the note or any part of it if the bank had returned the note as agreed.

4. For breach of an agreement by a bank to return to the holder at a certain time a note sent to the bank for collection, the holder was entitled to recover nominal damages although it was found that even if the note had been returned there was no probability that the maker would have paid it.
5. The amount of a note being in excess of the jurisdiction of a justice of the peace, the holder, suing for such amount as damages for breach of a contract by a bank to collect or return the note, was entitled to bring his action in the circuit court and, on recovery of nominal damages, to recover costs also.

APPEALS from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Cross-appeals from a judgment for nominal damages and costs in favor of the plaintiff and against the defendant.

For the appellant there were briefs by *Dithmar & Carow,* and oral argument by *J. W. Carow.*

G. Stevens, for the respondent.

TIMLIN, J. The action as shown by the complaint is on contract. It avers that the defendant for a valuable consideration undertook and agreed to present the note in question to the maker for payment, and in case of nonpayment to return it to the plaintiff on February 5, 1902, and then avers that defendant failed and neglected so to do, whereby the sum due and payable on said note was wholly lost to the plaintiff.

It is always a close question whether a complaint is for breach of contract or negligent omission of duty imposed by law where the same act would constitute a breach of the contractual obligation as well as of the legal duty. The averments of the contract obligation taken together with the words "failed and neglected to return the same to the plaintiff as requested" determine the character of this complaint as one upon contract and not one where negligent omission of duty imposed by law is relied on. In the latter case the act upon which liability is predicated is charged to have been negligently done. In the former that the party bounden "failed

and neglected," that is to say "omitted," to perform. Winslow's Forms, Nos. 903, 904; *Van Oss v. Synon,* 85 Wis. 661, 56 N. W. 190; *Lane v. Frawley,* 102 Wis. 373, 78 N. W. 593; *Casgrain v. Hamilton,* 92 Wis. 179, 66 N. W. 118.

The oral demurrer to the complaint on the ground that the plaintiff is shown thereby to have been an unlicensed foreign corporation doing business in this state was not well taken because the complaint shows no more than that the plaintiff, a foreign corporation, sent a note to defendant bank for collection, with instructions to return the same if not paid by February 5, 1902. *Catlin & P. Co. v. Schuppert,* 130 Wis. 642, 110 N. W. 818.

The jury found upon special verdict that there was no reasonable probability that the maker would have paid the note or any part of it had the bank performed its part of the contract. It is said that this finding is not supported by evidence. But it appeared without contradiction that on and between April 9 and April 29, 1902, the plaintiff delivered to Rieser, the maker of the note in question, other merchandise to the amount of $937.25, in pursuance of a contract made the fall before, and that the note in question was dated April 23, 1901, and due September 1, 1901, and for the sum of $329.25. It was on January 23, 1902, sent to the defendant bank with instructions to present the same to the maker, Louis Rieser, for payment, and if not paid by February 5, 1902, to return the same to the plaintiff. The defendant omitted to return the note to the plaintiff and the plaintiff omitted to make demand therefor. About September 22, 1902, an agent of the plaintiff came to Sauk City with apparent authority to collect from Rieser for the sales of April, 1902. Rieser mortgaged his homestead, which contained something more than one fourth of an acre, was within the limits of an incorporated village, and worth altogether about $1,200, to the defendant bank for $815, and out of the money thus raised paid the plaintiff's agent on or about September 22, 1902, $700 to apply on the said purchase, and paid the

bank about $115 on other demands, first offering to the agent, however, to apply part of the $700 in payment of the note in question. The agent answered that he had no account of that note and no authority to collect it, and insisted on Rieser applying all the money on the later account. Rieser also gave this agent some notes of third persons belonging to Rieser to cover the balance due on the sales made to Rieser by the plaintiff in April, 1902. Rieser was adjudicated a bankrupt on March 19, 1903, and outside of this mortgaged homestead property had no property liable to seizure on execution and very little property of any kind, and was not able to turn over anything to his assignee in bankruptcy. It was also in evidence that at the time Rieser bargained for the goods of the plaintiff which were delivered to him in April, 1902, the plaintiff's agent informed Rieser that the plaintiff would take care of the note in question awhile and not press Rieser for payment of it, if the latter would give an order for these goods, and Rieser then told this agent that he could not do anything for the plaintiff on that note until the next summer. In considering whether there was evidence to support the verdict we must eliminate from Rieser's resources the money and property which the plaintiff secured from him on September 22, 1902. The plaintiff could not come in on this later demand and strip Rieser of his resources for payment and then hold the defendant liable because the defendant might have collected out of these same resources or might have returned the note and enabled the plaintiff to collect out of these same resources. 1 Sutherland, Dam. (3d ed.) §§ 88, 89, 90; *Franklin v. Smith,* 21 Wend. 624; *Lawrence v. Porter,* 26 L. R. A. 167. Taking this out of Rieser's resources there was ample evidence to support the verdict of the jury notwithstanding the burden of proof was upon the defendant to show that there was no reasonable probability that the note would have been paid and that it could not have been collected had it been returned. Hence the circuit court did not err in refusing to direct a verdict for the amount of this

note in favor of the plaintiff nor in refusing to change the answer of the jury to the special verdict from "no" to "yes."

Upon the defendant's appeal it is claimed that the judgment should be reversed because the court awarded nominal damages and costs to the plaintiff. There was a breach of the contract on the part of the defendant in failing to return the note on February 5, 1902. For this breach the plaintiff was entitled to nominal damages at least. The evidence heretofore referred to, of the insolvency of Rieser and his attitude toward the note in question and the improbability of his paying the note in question, went only to show that the plaintiff was not damaged to the extent of the amount due on the note or any part of that amount, but was not otherwise defensive matter. The note being in excess of the jurisdiction of a justice of the peace, the plaintiff, suing for the amount thereof as damages for breach of a contract to collect or return, was entitled to begin an action in the circuit court and to recover costs. Sec. 2918, Stats. (1898), and cases in note.

By the Court.—The judgment of the circuit court is affirmed.

CLARK, Appellant, vs. NORTH, Respondent.

April 12—April 30, 1907.

Mechanics' liens: "Consent" of landowner to improvements.

Plaintiff drilled a well on defendant's land at the request of one R., who paid for the work but not for the casing or tubing furnished by plaintiff. Before starting the work plaintiff asked defendant who was to pay for the casing, and defendant told him that R. was to furnish the well complete, and that he (defendant) would not pay for anything in connection with it. *Held*, that defendant did not *consent* to the improvement, within the meaning of sec. 3314, Stats. (1898), so as to give plaintiff a right to a lien on the land for the materials furnished.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an action to enforce a mechanic's lien upon the lands described for 245 feet of casing or tubing, of the reasonable value of sixty cents per foot, put into a well drilled by the plaintiff thereon between March 20, 1906, and April 13, 1906. The complaint, among other things essential in such cases, alleges, in effect, that prior to March 20, 1906, the defendant entered into an optional contract with one Rodgers, whereby the defendant optioned the lands therein described to Rodgers on condition that Rodgers would drill a hole thereon at a place chosen by the defendant at his own expense; that the plaintiff went to the premises of the defendant with machinery to do the work and so informed the defendant, and that Rodgers would not pay for the casing or tubing, whereupon the defendant agreed to pay the same and located the place where he desired the well to be located. The answer admits that the defendant was the owner of the premises, but otherwise denies each and every allegation of the complaint.

At the close of the trial the court found as matters of fact, in effect: (1) That the defendant is the owner of the forty acres of land described and has been during all the times therein mentioned; (2) that between March 20 and April 13, 1906, the plaintiff drilled a well upon the land described; (3) that such well was drilled upon the order of one William C. Rodgers, who paid the plaintiff for drilling the same, but that neither said Rodgers nor any other person has paid the plaintiff for the tubing placed in the well so drilled by the plaintiff, and that such tubing is reasonably worth $147; (4) that when the plaintiff went to drill the well he told the defendant that Rodgers had sent him to drill the well, and asked the defendant who was to pay for the casing; that the defendant then told the plaintiff that Rodgers was to furnish the well complete and that the defendant would not pay for

anything in connection with the well; (5) that after such conversation the plaintiff drilled the well in question at the place designated by the defendant; (6) that the plaintiff duly filed his claim for lien, as required by law, May 21, 1906. As conclusions of law the court found, in effect, that the plaintiff has no cause of action, that the lands described be discharged from such lien and claim of lien, and that the defendant have and recover his costs and disbursements in this action, to be taxed according to law, and ordered judgment to be entered accordingly. From the judgment so entered dismissing the complaint the plaintiff appeals.

For the appellant the cause was submitted on the brief of *Grotophorst, Evans & Thomas.* They contended, *inter alia,* that there is a vital distinction between such consent as would make defendant liable for the tubing and the consent which would subject the land to a lien for the improvement. The fifth finding of the trial court, that after the conversation respecting payment for the tubing "plaintiff drilled the well in question *at the place designated by the defendant,*" shows that there was both knowledge and consent by defendant. *Lentz v. Eimermann,* 119 Wis. 492; *Edwards & M. L. Co. v. Mosher,* 88 Wis. 672; *Bentley v. Adams,* 92 Wis. 386; *Coorsen v. Ziehl,* 103 Wis. 381; *Van Horn v. Van Dyke,* 96 Wis. 30; *Heath v. Solles,* 73 Wis. 217; *North v. La Flesh,* 73 Wis. 520.

For the respondent there was a brief by *Dithmar & Carow,* and oral argument by *J. W. Carow.*

Cassoday, C. J. Undoubtedly the statute gives to every person who performs any work or labor or furnishes any material in digging a well a lien upon the interest of the owner of any such structure, "or of the interest of the person causing such work or labor to be done, or such materials . . . to be furnished, in and to the land upon which the same is situated, not exceeding forty acres," and also pro-

vides that "such lien . . . shall also attach to and be a lien upon the real property of any person upon whose premises such improvements are made, *such owner having knowledge thereof and consenting thereto,* and may be enforced as provided" therein. Sec. 3314, Stats. (1898). This last provision was incorporated into the section by the amendment of 1885 (ch. 349).

The important question in the case is whether upon the facts in the record the plaintiff is entitled to a lien by virtue of that amendment. Seven years prior to that enactment it was held by this court that no lien could be enforced for a building erected on the land of a married woman, under a contract with her husband in his own name and not as her agent, notwithstanding the building was so constructed "with the full knowledge, consent, and approbation" of the wife, who daily viewed and inspected the work while in process of construction. This was on the ground that there was no personal liability of the wife. *Lauer v. Bandow,* 43 Wis. 556. Such ruling was followed by other cases to the same effect. *Leismann v. Lovely,* 45 Wis. 420; *Wright v. Hood,* 49 Wis. 235, 5 N. W. 488; *Challoner v. Bouck,* 56 Wis. 652, 656, 14 N. W. 810; *Engfer v. Roemer,* 71 Wis. 11, 15, 36 N. W. 618; *Heath v. Solles,* 73 Wis. 217, 222, 40 N. W. 804, 806. This last case was decided three years after the amendment, and it is therein stated, in the opinion of Mr. Justice TAYLOR, that the amendment "was intended to change the law as theretofore existing in this state, as interpreted by the decisions of this court." It is there further said:

"If the owner permits a husband or wife, child, parent, or a stranger to erect a building on his or her land, with his or her knowledge and consent, under the clear meaning of the statute his or her interest in the real estate is charged with a lien for the unpaid work or materials." To the same effect: *North v. La Flesh,* 73 Wis. 520, 529, 41 N. W. 633; *Edwards & M. L. Co. v. Mosher,* 88 Wis. 672, 676, 60 N. W. 264.

In a later case it was held, in effect, that where the contract for the improvement of a building owned by a wife was made by the husband in his own name and not as agent, without any communication directly or indirectly with the wife, her consent to do the work could not be implied from mere silence; that her mere neglect to advise the contractors of her ownership of the property could not be construed to be the consent contemplated in the statute. *Coorsen v. Ziehl*, 103 Wis. 381, 386, 79 N. W. 562. In that case Mr. Justice BARDEEN, among other things, said:

"The proof is that she [the wife] was not consulted before the contracts were made, and that she did not in any way sanction or direct the work as it progressed. She lived in the building with her husband, and undoubtedly knew of the work as it progressed, and from these facts it is argued that she is brought within the terms of sec. 3314."

He then cites cases relied upon by counsel to support such arguments, and above cited. The court continues:

"But there is a clear distinction between these cases and the case at bar. In each case there was proof of the *express consent* of the owner to the erection of the building upon which the lien was claimed. Here there is no such proof. . . . Consent cannot be inferred from mere silence, under these circumstances."

In the case at bar the well was drilled by the plaintiff pursuant to an agreement with one Rodgers, who paid him therefor except for the tubing here sought to be collected, as mentioned in the foregoing statement. The complaint alleges that the well was drilled "at the special instance and request of the defendant," but there is no evidence tending to show any contract relation between the plaintiff and defendant. On the contrary it is established, and in fact undisputed, that when the plaintiff told the defendant that Rodgers had sent him there to drill the well the defendant told him "that Mr. Rodgers was to furnish the well complete and that the defendant would not pay for anything in connection with the well."

The plaintiff had no contract relations with any one except Rodgers, and the defendant had no contract relations with any one except Rodgers. He is not attempting to enforce any lien, and the plaintiff is not attempting to enforce any subcontractor's lien. It is in effect conceded that the defendant had knowledge that the well was being drilled at the time it was being constructed. The controversy is whether the defendant consented to such construction within the meaning of the statute quoted. The word "consent" is defined to be the "voluntary allowance or acceptance of what is done or proposed to be done by another. In law—intelligent concurrence in a contract or an agreement of such a nature as to bind the party consenting; agreement upon the same thing in the same sense." Century Dict. Numerous adjudications might be cited in harmony with such definitions. 2 Words & Phrases, 1437, 1438.

Two instructive cases are cited by counsel for the defendant. One was under a statute giving a lien in favor of any person erecting any building upon the land of another "by virtue of an agreement with or consent of the owner of the land upon which such building is erected." A husband contracted in his own name for the construction of two houses on the land of his wife, who had previously consented to such erection on the promise of the husband that he would pay for them, she not supposing that her land was liable to a lien therefor, but saw the buildings being erected and made no objection, and gave no notice to the builder that the land was hers, and the builder did not know that the title was in the wife; and it was "held not to constitute a consent of the wife, within the meaning of the statute." *Huntley v. Holt,* 58 Conn. 445, 449, 20 Atl. 469, 470. ANDREWS, C. J., speaking for the court, there said:

"Consent means the unity of opinion; the accord of minds; to think alike; to be of one mind. Consent involves the presence of two or more persons, for without at least two persons

there cannot be a unity of opinion, or an accord of minds, or any thinking alike. When the statute uses the words 'by the consent of the owner of the land,' it means that the person rendering the service or furnishing the materials and the owner of the land on which the building stands must be of one mind in respect to it."

The other case was under a statute giving a lien for improvements made "with the consent of the owner," and the court said:

"Mere acquiescence in the erection or alteration, with knowledge, is not sufficient evidence of the consent which the statute requires. There must be something more. Consent is not a vacant or neutral attitude in respect of a question of such material interest to the property owner. It is affirmative in its nature. It should not be implied contrary to the obvious truth, unless upon equitable principles the owner should be estopped from asserting the truth." *De Klyn v. Gould,* 165 N. Y. 287, 59 N. E. 97.

Certainly, the plaintiff and defendant were not of one mind as to who should pay for the tubing of the well. The same is true as to the defendant and Rodgers. According to the evidence and the findings of the court the only consent the defendant ever gave to Rodgers or the plaintiff was on condition that the well should be furnished complete without any expense or payment on the part of the defendant. Such conditional consent was in effect a protest against the construction of the well at the expense of the defendant in whole or in part. There was in effect a waiver of any supposed lien. *Davis v. La Crosse H. Asso.* 121 Wis. 579, 99 N. W. 351.

What has been said covers all the questions calling for consideration.

By the Court.—The judgment of the circuit court is affirmed.

STATE EX REL. DELEGLISE, Appellant, vs. PARSONS, County Judge, Respondent.

April 13—April 30, 1907.

Guardian and ward: Special guardians: Constitutional law: Due process of law.

1. Sec. 3995c, Stats. (Supp. 1906; Laws of 1905, ch. 89), does not authorize the appointment of a special guardian after the appointment and qualification of a guardian, even though an appeal has been taken from the order of appointment and a stay of proceedings had.

[2. Whether sec. 3995c, Stats. (Supp. 1906; Laws of 1905, ch. 89), which provides for appointment of special guardians without notice, is valid, not determined.]

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is a *certiorari* proceeding brought to review the determination of the county court of Langlade county in appointing a special guardian for appellant, *Mary Deleglise.* The appeal here is from the judgment of the circuit court quashing the writ. It appears from the record that application was made on notice to the county court of Langlade county for the appointment of a guardian over the person and estate of the plaintiff, *Mary Deleglise;* that a hearing was had upon such application, and on the 30th day of December, 1905, one Edward Cleary appointed guardian, and letters of guardianship issued to him and he qualified as such guardian; that an appeal was duly taken to the circuit court for Langlade county from such order appointing him guardian and a stay of proceedings duly obtained; that after said appeal and stay, upon application made *ex parte* and without notice to the plaintiff, *Mary Deleglise,* the county judge of Langlade county made an order appointing said Edward Cleary special guardian, assuming to act under the provisions of ch. 89, Laws of 1905.

For the appellant there was a brief by *Goodrick & Goodrick,* and oral argument by *A. B. Goodrick.* To the point that ch. 89, Laws of 1905, contravenes sec. 1, art. XIV, Const. of U. S., in that it does not provide for "due process of law," they cited *Bertholf v. O'Reilly,* 74 N. Y. 509, 519; *Stuart v. Palmer,* 74 N. Y. 183; 8 Cyc. 1083, 1094; 16 Am. & Eng. Ency. of Law (1st ed.) 807; Cooley, Const. Lim. (4th ed.) 438; *Hovey v. Elliott,* 167 U. S. 409, 414; *In re Boyett,* 136 N. C. 415, 1 Am. & Eng. Anno. Cas. 729; *Dietz v. Neenah,* 91 Wis. 422, 429; *Schiltz v. Roenitz,* 86 Wis. 31, 40; *In re Bassett,* 68 Mich. 348, 36 N. W. 97; *In re Myers,* 73 Mich. 401, 41 N. W. 334; *Campbell v. Campbell,* 63 Ill. 462; *Chase v. Hathaway,* 14 Mass. 222.

For the respondent there was a brief by *T. W. Hogan* and *Foster & Morson,* and oral argument by *Mr. Hogan.*

KERWIN, J. The question for determination upon this appeal is the authority to appoint a special guardian for the plaintiff, *Mary Deleglise,* under sec. 3995*c,* Stats. (Supp. 1906; Laws of 1905, ch. 89). This law is attacked as unconstitutional by counsel for appellant, and a very able and interesting argument is made upon the constitutionality of the law, which provides for the appointment of a special guardian without notice; but from the view we take of the case before us it is unnecessary to consider such question. Therefore we do not determine whether the law is constitutional or not. Sec. 3995*c,* Stats. (Supp. 1906; Laws of 1905, ch. 89) provides:

"When there shall be delay in appointing a guardian of a minor, insane person or other person subject to guardianship, or in issuing letters of guardianship to such guardian, occasioned by any contest concerning a guardian appointed in any will, or from any other cause, or when it shall appear to the satisfaction of the court to be necessary, the county court may appoint a special guardian for such ward, to act until the matter causing the delay shall be disposed of or the ne-

cessity therefor cease to exist. No appeal shall be allowed from the appointment of such special guardian, and such special guardian may be appointed without notice. Such special guardian may be removed whenever the court may so order."

It seems very clear from the foregoing section that the purpose of the legislature in the enactment of this law was to provide for the appointment of a special guardian in case of delay in the appointment of a guardian for a minor, insane person, or other person subject to guardianship, and for another class of cases where there is a contest concerning a guardian appointed in a will, or from other cause, or where it shall appear necessary. The case before us clearly falls within the first provision of this statute, respecting delay in the appointment of a guardian. The provision for appointment of a special guardian in cases like the one before us manifestly relates to ancillary proceedings pending the delay in appointment of a guardian. All of the provisions of the statute fairly imply that the special guardian is one to be appointed pending delay in the appointment of a guardian, and that after a guardian is appointed no right exists to appoint a special guardian, and, if a special guardian be appointed before the appointment of a guardian, the rights of the special guardian are terminated upon the appointment of the guardian. The statute by its terms shows this to be the manifest intention of the legislature in providing that "when there shall be delay in appointing a guardian of a minor, insane person or other person subject to guardianship," a special guardian may be appointed. Sec. 3995*c*, Stats. (Supp. 1906; Laws of 1905, ch. 89). Sec. 3995*f* of the same act provides that the power of the special guardian "shall cease upon the issuing of letters of guardianship to the guardian of his ward." We think it clear that the provisions in this act for the appointment of a special guardian in a case like the one before us have reference to ancillary proceedings

merely before the appointment of a guardian, and that the court had no jurisdiction to appoint a special guardian of the plaintiff, *Mary Deleglise,* after the appointment and qualification of Edward Cleary as guardian. Statutes of this nature, against common right, and affecting in a measure the property rights and liberty of the party placed under guardianship, should not be extended beyond their plain meaning, and we think the language of this statute is clear that the jurisdiction of the court to appoint a special guardian in a case like the one before us terminated with the appointment and qualification of the guardian, although an appeal had been taken from the order of appointment and a stay of proceedings had. *In re Guardianship of Welch,* 108 Wis. 387, 84 N. W. 550; *Waterman v. Raymond,* 5 Wis. 185.

The plaintiff was entitled to her appeal from the order appointing Edward Cleary guardian and stay of proceedings, so that it might be determined in the appellate court whether the order in the county court was wrong. She was entitled, pending the appeal, to have the status preserved and to protection from any interference with her liberty or property rights until final determination of the question involved. The law affords her this right on appeal from the appointment of a guardian, and to allow the appointment of a special guardian pending the delay would be to allow to be accomplished indirectly what could not be accomplished directly, and thus defeat the protection afforded the appellant by appeal and stay of proceedings. We are satisfied that the county court had no jurisdiction to appoint a special guardian after appointment and qualification of the guardian. Therefore all proceedings respecting the appointment of Edward Cleary special guardian are void and should be set aside and vacated. Respondent relies upon *Bumpus v. French,* 179 Mass. 131, 60 N. E. 414; but an examination of this case discloses that the appointment of a temporary guardian was made before appointment of a permanent guardian. Hence the case in

no way conflicts with the conclusions at which we have arrived.

By the Court.—The judgment of the court below quashing the writ of *certiorari* is reversed, and the cause remanded with instructions to set aside and vacate the order and all proceedings respecting the appointment and qualification of Edward Cleary as special guardian of the appellant, *Mary Deleglise.*

KUEHN, Appellant, vs. NEROZ, Respondent.

April 13—April 30, 1907.

Appeal: Record: Bill of exceptions: Reversal of judgment.

1. In a garnishee action in aid of an execution issued on a justice's judgment in a replevin action, plaintiff had judgment in justice's court and defendants appealed. In the circuit court, on defendants' motion, the garnishee action was dismissed for want of jurisdiction. On appeal from the judgment of dismissal a bill of exceptions was settled purporting to show all that occurred on such dismissal, but it did not contain any of the proceedings in the replevin action or execution. *Held*, that such proceedings are not a part of the record in the garnishee action and are not before this court on the appeal from the judgment of dismissal.
2. In such case no jurisdictional defects being claimed to exist except in the replevin proceedings and execution, the judgment of dismissal must be reversed.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Garnishee action in aid of an execution issued on a judgment entered in justice's court in a replevin action.

The execution creditor made and delivered to the constable who held the execution an affidavit in substantial compliance with the statute for the purpose of having an alleged debtor of the execution debtor duly summoned as garnishee. A

summons was served accordingly on the execution debtor and also on an agent of the garnishee, the latter being a corporation, and the officer not being able to find it within his county. The garnishee duly appeared and answered admitting the indebtedness to the execution debtor at the time of the service of the garnishee summons to the extent of $91.68. Such debtor duly appeared and answered denying all the allegations of the garnishee affidavit and claiming that the indebtedness from the garnishee was exempt from seizure because the same consisted of wages for labor performed by such debtor during three months prior to the making of the answer, and at not exceeding $60 per month.

As a result of the trial of the garnishee action, judgment was rendered in favor of the plaintiff, from which an appeal was taken to the circuit court. There the attorneys for the defendants moved for a dismissal for want of jurisdiction. The motion was granted and judgment of dismissal with costs and discharging the garnishee from all liability was rendered.

A bill of exceptions was settled merely showing that upon the case being called for trial, before entering upon the examination of witnesses, a motion was made on behalf of the defendants to dismiss the action upon the ground that the court had no jurisdiction thereof; that the motion was granted; that due exception was taken thereto; and that judgment was rendered accordingly and docketed in the office of the clerk of the circuit court for Shawano county June 28, 1906.

F. Y. King, for the appellant.

For the respondent there was a brief by *Olen & Olen,* and oral argument by *O. L. Olen.*

MARSHALL, J. Counsel present the case as if the proceedings before the justice in the replevin action were a part of the record in the garnishee action as it was closed in the circuit court, and were before us as a part of the judgment roll on this appeal. That is a mistake. The garnishee action

while incident to, is practically separate from, the replevin action. The pleadings in the former are the affidavit for the issuance of the garnishee summons and the answers thereto. The judgment roll in the circuit court consists of such pleadings, the summons, the order for judgment, and the judgment. There being no bill of exceptions containing anything outside of such judgment roll, that is all there is before us for consideration. That is elementary.

In *Butler v. Gillis,* 104 Wis. 421, 80 N. W. 735, quite a similar situation to that here was presented. The action was commenced in the municipal court of Douglas county. It was carried by appeal from the judgment there rendered to the circuit court for such county. In the latter court there was a motion based upon the papers in the case and others for a judgment reversing the judgment of the municipal court, in part, and the motion was granted. On appeal to this court there was no bill of exceptions incorporating into the record matters outside the judgment roll proper. The judgment was affirmed, the court holding that it could not look beyond such judgment roll to test the validity of the judgment. *Jos. Schlitz B. Co. v. Washburn B. Asso.* 122 Wis. 515, 100 N. W. 832, is to the same effect.

From the foregoing it will be seen that in order to enable appellant to show here that the judgment of dismissal could not be justified by jurisdictional defects in the replevin proceedings and execution, the same should have been incorporated into the bill of exceptions, and in order to enable respondents to show the contrary, since a bill of exceptions was settled purporting to relate all that occurred on the dismissal, it was important that such proceedings and execution should not be omitted therefrom.

As the matter stands we have only the judgment roll in the garnishee action before us. The bill of exceptions, as stated, does not add anything material to the record. Such roll does not disclose any substantial defect. On the oral ar-

gument none was claimed to exist, except in the replevin proceedings and execution; none in the record proper. Therefore, the judgment must be reversed and the cause remanded for further proceedings according to law, though the reversal must rest upon different grounds than those assigned.

By the Court.—The judgment is reversed, and the cause remanded for further proceedings according to law.

LYTTLE, Respondent, vs. GOLDBERG and others, Appellants.

April 13—April 30, 1907.

Married women: Release of interest in land: Validity of promise to pay therefor: Statute of frauds: Attorneys at law: Champerty: Evidence: Instructions to jury: Special verdict: Mistake: Improper remarks of counsel: Reversal or modification of judgment: Reduction of damages: Costs on appeal: Real-estate brokers: Commissions.

1. A fully executed release by a married woman of her interest (even inchoate) in real estate is a sufficient consideration for a promise to pay a sum of money for such release, and neither her marital status nor the statute of frauds presents any obstacle to the validity of such promise.
2. Undisputed evidence of plaintiff's complete poverty does not necessarily establish a champertous agreement on the part of her attorneys to assume the burden of the litigation.
3. The fact that the jury were instructed to answer questions in the special verdict one way or another accordingly as they adopted the "claim of the plaintiff" or "the claim of the defendants" does not necessarily require a reversal where it appears that the jury must have understood the effect of their answers without any such suggestion; but such method of instruction is not to be approved.
4. Nor does a reversal necessarily result from the fact that in respect to one question the court by mistake ascribed plaintiff's contention to the defendants, and defendants' to the plaintiff.
5. Remarks of plaintiff's counsel in argument to the jury, referring to his client's poverty, and other remarks apparently intended to prejudice and inflame the jury against defendants, are criti-

cised, but whether by themselves they would necessitate a reversal is not decided.

6. Where the prejudicial effect of errors in the charge or of improper remarks of counsel can be obviated by a reduction of the amount of plaintiff's recovery, the supreme court on appeal may make such reduction and affirm the judgment as modified accordingly, instead of reversing and remanding for new trial.
7. Upon modification and affirmance of the judgment in such a case the appellant is allowed to recover costs on the appeal.
8. Traveling expenses of brokers in connection with a sale of land and compensation paid by them to a subagent are *held* to have been covered and compensated by their agreed commission of a specific amount on the sale.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Modified and affirmed.*

Action to recover moneys due under an alleged contract whereby, in consideration of the plaintiff's joining in a warranty deed of conveyance of her husband's farm, the defendants agreed to sell said farm and certain personal property received therewith, and, after retaining a commission of $100, to pay to the plaintiff all excess above the amount of the indebtedness against said property. The defendants denied such contract and claimed that the plaintiff had executed such conveyance in consideration of the sum of $50, which had been paid her in full. The case was tried to a jury and a special verdict returned as follows:

"(1) Did the plaintiff, *Louisa Lyttle,* agree with the defendants to accept $50 in full payment for her interest in and to the farm and personal property? *A.* No. (2) If you answer the first question by 'Yes,' you need not answer any other question. If you answer the first question 'No,' then answer the following question: Did the defendants agree with the plaintiff that if she released all her interest in and to the farm and personal property they would sell the farm and personal property for the best price obtainable, pay off certain indebtedness, retain $100 for their commission, and pay the balance, if any, to the plaintiff? *A.* Yes. (3) What sum

did the defendants receive from the purchaser of said farm and personal property? *A.* (by the court) $2,800. (4) What was the amount of the indebtedness which the defendants paid or canceled under their agreement? *A.* $1,999.16. (5) What was the value of the personal property, other than that derived from the Lyttles, sold and delivered by defendants to the Sehrings with the sale of the farm? *A.* $334. (6) What was the value of the personal property which the defendants received from the Lyttles which was not included in the sale to the Sehrings and which they retained? *A.* $165. (7) Did the plaintiff sign the bill of sale (Exhibit 3), as claimed by the defendants? *A.* No. (8) Did the plaintiff sign the instrument Exhibit 1, as claimed by the defendants? *A.* No."

The defendants had moved for a nonsuit and for direction of a verdict, and, after its rendition, moved to reverse the answers to the first, second, seventh, and eighth questions and to change the answer to the fifth question to $644 and to the sixth question to $20; which motions being overruled, judgment for the plaintiff was entered for $702.93 damages, together with costs, from which the defendants appeal.

For the appellants there was a brief by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.*

For the respondent there were briefs by *Eberlein & Eberlein,* and oral argument by *M. G. Eberlein.*

DODGE, J. As a preliminary defense appellants argue that the contract sued on is void both because of plaintiff's incapacity as a married woman and because of the statute of frauds avoiding parol contract for conveyance of any interest in real estate. The contention cannot be sustained. Neither the statute of frauds nor plaintiff's marital status presents any obstacle to the validity of defendants' promise to pay a sum of money upon a sufficient consideration. A fully executed release of her interest in real estate, even inchoate, is such consideration, whether her executory promise so to do would be or not. *Watters v. McGuigan,* 72 Wis. 155, 39

N. W. 382; *Kriz v. Peege,* 119 Wis. 105, 121, 95 N. W. 108; *Morton v. Smiley,* 119 Wis. 156, 96 N. W. 534; *Badger T. Co. v. Wolf River T. Co.* 120 Wis. 169, 175, 97 N. W. 907; *Sykes v. Chadwick,* 18 Wall. 141.

Another preliminary defense is that of champerty and maintenance predicated upon what appellants' counsel considers undisputed evidence that plaintiff's poverty was so complete as to preclude any reasonable expectation on the part of her attorneys that she could pay, or reimburse to them, any expenses or costs that they might advance, except upon the contingency of a recovery in this action. The evidence negatived any express agreement by the attorneys to advance or defray any such costs or expenses, and the testimony of both plaintiff and her attorneys was that she expected to pay them and they expected to be paid, and there was perhaps some evidence of at least her possible ability to pay something. But, even conceding that the evidence of plaintiff's complete poverty was either undisputed or overwhelming, we cannot assent to the proposition that such fact necessarily established a champertous agreement on the part of the attorneys to assume the burden of this litigation. Insolvency or poverty at any time is not absolutely exclusive either of the ultimate payment of honest debts or of the contingency that friends might be willing to aid; or, indeed, that she might be able to obtain, at least in large part, the necessary service of officers and attendance of witnesses by some other means than the advance of fees therefor by her counsel. While the fact of poverty might, in connection with other facts and circumstances, be evidentiary as to the true understanding or agreement between client and attorney, it is of no such conclusive or irresistible effect as contended for by appellants, and we cannot say that the court's conclusion as to whether there did exist a champertous agreement in this case can be set aside.

The trial of this action was pervaded by much of confusion, and the instructions, many of which were excepted to and assigned as error, very imperfectly presented to the jury the is-

sues upon which they were to pass by answers to the different questions. Over and over again the jury were instructed to answer questions one way or another, accordingly as they adopted the "claim of the plaintiff" or "the claim of the defendants;" thus, as counsel for the appellants argues, very obviously indicating to the jury the tendency of either answer in its ultimate effect upon the respective parties. This method of instruction is not to be approved. The jury should be held as nearly as possible to the abstract questions of fact, as has been said in so many cases, unguided by any suggestion of the interest of either party. Nevertheless, it is of course true that the ordinary jury will, in the great majority of cases, appreciate the effect of an answer, and not every intimation from the court from which they might draw inferences is to be held so prejudicial as to necessitate reversal. In the present case there could be little, if any, doubt that the jury must have understood the effect of their answers without any suggestion other than the knowledge of the issues necessarily obtained by them in the course of the trial. So that, with some hesitation, we have concluded that reversal need not necessarily result from the manner of describing the issues above mentioned; nor because in his instructions with reference to the second question the court, as appears at least by the record, reversed the parties and ascribed the plaintiff's contention to the defendants, and the defendants' to the plaintiff. Other criticisms of the instructions present no questions of law of general interest to warrant preservation of their discussion in an opinion. We shall merely mention such as we deem prejudicially erroneous.

On the second question the court instructed that if the jury answered the first question "No" they must, in his opinion, answer the second question "Yes." This was erroneous, because included in the second question was not merely the concrete issue whether plaintiff signed the deed in consideration of $50, or, as an alternative, upon the defendants' promise to pay over to her proceeds of some sale, but also the question

whether, if the latter contract were made, it included a promise to pay proceeds of personal property. After careful examination of plaintiff's testimony we are convinced that it in no wise supports this latter element; but, even if it might be considered so ambiguous as to warrant an inference that the defendants' promise did include proceeds of personal property, it by no means followed that the jury must find that it did so merely because they found that plaintiff did not accept the $50 in full payment for her signature to the deed.

The instruction with reference to the fourth question was erroneous in that it incorrectly understated the amount contended for by appellants.

The instruction with reference to the fifth question so entirely confused defendants' claim that a certain team of the agreed value of $500, in the proceeds of which plaintiff should have no interest, was included in the sale at a gross price of $2,800, that we can feel no assurance that the jury intelligently passed thereon.

As to the sixth question the amount was obviously increased some $20 by instructing the jury to find the reasonable value of certain personal property, when, under the alleged contract, defendants were to account only for the proceeds thereof on sale, the amount of which, as also the fact of sale, was established by undisputed evidence.

The most serious difficulty we have encountered in reaching a conclusion that the rights of the parties can in any wise be determined from this verdict arises from certain remarks of plaintiff's counsel in the course of his argument to the jury. The most serious are as follows: "But, gentlemen, remember that this is a poor woman, as brought out by the evidence." Upon objection being raised to this the court ruled that it was not proper, and that poverty was not proper to be considered or commented on to the jury at all. Again, counsel asserted that "$500 of the indebtedness was not honest indebtedness." There was no evidence whatever to impugn the integrity of any $500 claim which the defendants made against the prop-

erty. This was objected to and exception reserved, but no ruling made by the court. Again, counsel industriously called the attention of the jury to a brother of the defendants, who, it was claimed, was a notoriously disreputable person in the community, but who had no relation to the case whatever so far as any evidence disclosed. This also was objected to and exception reserved, but no ruling or criticism was made by the court. It is difficult to account for such utterances upon any theory save a purpose to prejudice and inflame the jury against defendants and thus to divert them from their duty of fair and judicial consideration of the evidence. Were there no other error found, it might be a serious question whether such conduct of itself must not subject the client to the burdens of reversal and new trial; but, as other errors have already been pointed out, we need not definitely declare a conclusion on that question. We may content ourselves with emphasizing our disapproval of efforts on the part of counsel to pervert a verdict from a judicial declaration of the facts established by the evidence, to an expression of sympathy for or indignation against one or other of the parties.

All of the errors thus far commented upon, except possibly those with reference to misconduct of counsel, it will be observed, could have no effect upon the verdict or judgment save by way of enhancement of the recovery by inclusion therein of proceeds of personal property upon the farm, and the prejudicial effect of the remarks of counsel may well be believed to have been measured by some excessive allowance. *Hocks v. Sprangers,* 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113. It is, of course, highly desirable that litigation should be terminated, and, if the prejudicial effect of errors can be obviated by diminution of the amount of the recovery, justice and the interests of both parties will thereby be promoted. We think it plain from an examination of plaintiff's evidence that she nowhere testified that defendants agreed to account for or pay to her proceeds of any personal property; that the utmost of her contention was that they were to pay her pro-

ceeds of sale of the real estate after deducting the mortgages thereon and a commission of $100. She also concedes that the $50 paid to her was by way of advancement upon this agreement. Neither is there substantial dispute as to the amount allowed by Sehring, the purchaser, for personal property in the gross payment of $2,800 upon the purchase from the defendants of the farm and certain personal property. We have concluded, therefore, that the finding of the jury that the defendants did not procure plaintiff's signature to the deed for the payment of $50, but for a promise to account for the surplus proceeds of the real estate, is not so shown to have been prejudicially affected by any of the errors that it must be set aside, and, assuming such basis, that substantial justice will be accomplished if all considerations of personal property be eliminated from the recovery. The defendants confessedly received $2,800. The mortgages upon the real estate at the time of said sale amounted to $1,636.16. The personal property transferred to Sehring in the sale, of which there is any definite proof either of identity or value, was a team of horses at an agreed value of $500 and other specified property aggregating $134. There may have been some other personal property which had belonged to Moses Lyttle and passed to Sehring, but we fail to find any evidence which could have supported a verdict as to what that property was, or as to its value. The burden of proof to establish any such deduction from the conceded $2,800 gross price was upon the defendants; hence no deduction therefor could be allowed. These two amounts, aggregating $2,270.16, left as surplus proceeds $529.84, from which defendants were entitled to deduct their $100 commission, the $50 paid plaintiff, and $2 for an abstract, aggregate $152, leaving $377.84 as net proceeds of the real estate at the time of the sale, August 11, 1904; interest thereon to date of judgment would be $44.08, making total recovery $421.92. Certain other expenditures claimed to have been made by defendants in connection with

said sale, such as traveling expenses and compensation to a subagent, would clearly fall within and be compensated by their agreed commission of $100. If it be contended that plaintiff's evidence is ambiguous as to whether the deduction from the sale price of the land was to be merely the mortgages upon the land or all indebtedness from her husband to the defendants, that must be deemed immaterial because of the fact conceded by the defendants that they agreed to apply $250, allowed Moses Lyttle as the price of his team, upon such indebtedness, which would have satisfied all of the debts other than those secured by real-estate mortgages. We are persuaded that a reduction of plaintiff's damages to the amount above stated will eliminate therefrom any prejudice which can reasonably be ascribed to the errors committed upon the trial.

By the Court.—Judgment modified by reducing the amount of damages as of its date to $421.92, and, as so modified, is affirmed; appellants to recover costs in this court.

PIERCE and others, Appellants, vs. SIGNOR and others, Respondents.

April 13—April 30, 1907.

Contracts: Construction: Right of party to withdraw.

From the terms of a contract for the sale of a large amount of property, rights, concessions, etc., it would seem to have been uncertain, at the time of its execution, whether the parties would be able to carry it out. It provided that in case of the vendees' failure to fulfil its terms a certain sum paid by them at delivery of the contract should be forfeited to the vendors and the contract should be void, and that in case of the vendors' failure to fulfil said sum should be returned to the vendees and the contract should be void. *Held*, that while the contract remained executory the vendors had the right, upon returning or offering to return the sum paid, to withdraw from the contract and declare it void.

APPEAL from an order of the circuit court for Barron county: A. J. VINJE, Circuit Judge. *Affirmed.*

This is an appeal from an order overruling a demurrer to defendants' answer. The complaint claims damages on account of breach of contract. Defendants answered denying generally the allegations of the complaint, and admitting that they entered into a contract bearing date February 16, 1906, which is the contract attempted to be set up in the plaintiffs' complaint, but aver that said contract was not signed or executed by plaintiffs until the afternoon or evening of February 27, 1906; that it was signed by the defendants and one of the plaintiffs on or about February 16, 1906, and left with an attorney to be delivered when fully executed by plaintiffs; that plaintiffs at the same time deposited with the attorney their check for $1,000 to be delivered upon execution of said contract; that on the morning of February 28, 1906, defendants failed and refused to fulfil said contract and offered to return the $1,000; that at the time defendants failed and refused to fulfil and carry out said contract the plaintiffs were ready and willing to perform on their part. The defendants admit that their failure to carry out the terms of the contract was of some damage to the plaintiffs, but allege that by the terms of the contract defendants were authorized and entitled to so fail and refuse to fulfil the terms of the contract without being subject to the payment of damages, if any were sustained by plaintiffs by reason of such failure and refusal.

The contract provided for the sale by the defendants to plaintiffs of certain property and their interests in certain contracts and certain concessions from the government of the United States respecting lumbering rights on Indian reservation lands in Sawyer county, Wisconsin, and also certain property inventoried and belonging to the defendants. The contract recites that, under rules and regulations approved by the President of the United States, the defendants were authorized to purchase and manufacture into lumber timber on

the Lac Court Oreilles Indian reservation, Sawyer county, Wisconsin, under said rules and regulations, and agreed to sell and assign to plaintiffs all their interest in said concessions and property, which property is specified in said contract, and also assist, in all reasonable ways, the approval of the United States government to the transfer, and consent to the use of their rights and names in the purchase of timber for the benefit of the plaintiffs until such approval was obtained from the government authorities. The defendants, by the terms of said contract, agreed to assign to the plaintiffs all their rights in certain sawing, planing, dressing, matching, and lighting contracts entered upon by defendants, and the plaintiffs agreed to assume certain contracts specified. The contract, after specifying particularly the contracts to be assumed and the property transferred, further provides:

"The terms and times of payment of the money consideration under this agreement, on the part of the second party, shall be as follows: One thousand dollars ($1,000) upon the execution and delivery of this contract, and the balance, as shown by the invoice herein, on or before March first, 1906. All property, the subject of this agreement, not invoiced herein shall be paid for as soon as invoiced, at the close of the logging season of 1905 and 1906, not later than April 1, 1906. In case of failure of second party to fulfil the terms of this contract, the sum of one thousand dollars paid hereon at the execution and delivery of this contract shall be forfeited to first party, and this contract shall be void. In all matters touching or relating to dealings with the Indian allottees, and with the United States government, on the part of the second party or for the benefit of the second party, the second party agrees to become individually and severally responsible to the first party in like manner and degree as the first parties are held liable by the United States government. In case of failure of the first party to fulfil the terms of this contract, the sum of one thousand dollars, agreed to be paid by second party, shall be returned to second party and this contract be void. First party agrees to protect second party against all labor liens on logs and other property herein mentioned."

The court below overruled the demurrer, and from the order overruling it this appeal was taken.

For the appellants there was a brief by *Wickham & Farr,* and oral argument by *James Wickham.* They contended, *inter alia,* that the provision in the contract that it should be *void* in case of defendants' failure to fulfil its terms meant that it should be *voidable* at the election of plaintiffs. Anderson, Law Dict. 1092; *Melms v. Pabst B. Co.* 93 Wis. 153, 164; 29 Am. & Eng. Ency. of Law (2d ed.) 1065, 1070, and authorities cited; *Shenners v. Pritchard,* 104 Wis. 287, 290; *Willoughby v. Lawrence,* 116 Ill. 11, 56 Am. Rep. 758; *Western Bank v. Kyle,* 6 Gill, 343; *Creveling v. West End I. Co.* 51 N. J. Law, 34, 16 Atl. 184; *Clark v. Jones,* 1 Denio, 516, 43 Am. Rep. 706; *Cochran v. Pew,* 159 Pa. St. 184, 28 Atl. 219; *Webster v. Phœnix Ins. Co.* 36 Wis. 67, 71; *Gans v. St. Paul F. & M. Ins. Co.* 43 Wis. 108, 114; *Dick v. Equitable F. & M. Ins. Co.* 92 Wis. 46, 49; *Riggs v. Palmer,* 115 N. Y. 506, 5 L. R. A. 340, and cases cited in note on p. 344.

For the respondents there was a brief by *James Robbins* and *C. C. & A. E. Coe,* and oral argument by *Mr. Robbins* and *Mr. C. C. Coe.* They argued, among other things, that it is competent for the parties to a contract to provide for the discharge or annulment thereof by incorporating provisions or conditions to that end in the contract itself, and may fix and limit the rights and liabilities of each in the event of a failure of performance, and the courts will enforce contracts in this particular precisely as in other respects and in accordance with the rights of the parties as they are thus fixed and limited. *Merriman v. McCormick H. M. Co.* 96 Wis. 600; *Schwab v. Baremore,* 95 Minn. 295, 104 N. W. 10; *Mackey v. Ames,* 31 Minn. 103, 16 N. W. 541; *Dana v. St. Paul Inv. Co.* 42 Minn. 194, 44 N. W. 55; *Heisley v. Swanstrom,* 40 Minn. 196, 41 N. W. 1029; *Joslyn v. Schwend,* 85 Minn. 130, 88 N. W. 410; *Wahl v. Milwaukee,* 23 Wis. 272; 3 Page, Cont. §§ 1358–1360; *Kelly v. Bliss,* 54 Wis. 187; *Barrie*

v. King, 105 Ill. App. 426; *Avery v. Segura S. Co.* 111 La. 891, 35 South. 967; 3 Current Law, 844; *Wis. M. & F. Ins. Co. Bank v. Wilkin,* 95 Wis. 111; *Ward v. Am. H. F. Co.* 119 Wis. 12; 9 Cyc. 600; *Morrisey v. Broomal,* 37 Neb. 766, 56 N. W. 383.

KERWIN, J. As appears from the foregoing statement of facts, the contract in question was executed on the 27th day of February, 1906, and contained mutual provisions to the effect that, in case of failure of the second party (plaintiffs) to fulfil the terms of the contract, the sum of $1,000 paid thereon at the time of execution and delivery should be forfeited to the first party (defendants) and the contract be void; and, in case of failure of the first party (defendants) to fulfil the terms of the contract, the sum of $1,000 agreed to be paid by the second party should be returned to the second party and the contract be void. These provisions are clear and unambiguous, and we see no escape from the conclusion that the parties intended just what they said. It also appears quite clearly from the provisions of the contract that the parties advisedly put these stipulations into the contract. The $1,000 deposited by plaintiffs at the time of execution of the contract was to be applied upon the purchase price and the balance paid on March 1, 1906. The subject matter of the contract involved a large amount of property, contracts, rights, and liabilities, which by the terms of the contract were to be assumed and transferred to the plaintiffs, and which involved certain concessions, and it would seem from the terms of the contract that at the time of its execution it had not been definitely determined whether the parties would be able to carry out the terms of the contract as specified. At least this may be fairly inferred from its terms. So it is quite obvious that the parties to the contract adopted the mutual provisions respecting the terms upon which it might be declared void by either party while it remained executory. And it was doubtless con-

templated that, if the privilege to withdraw from the contract and declare it void were exercised by either party, it would be exercised while the contract remained executory, and that if the plaintiffs desired to exercise their option they could do so and forfeit the $1,000, and if defendants elected to withdraw from the contract and declare it void they might do so before performance under it. The case before us is not one where the parties had performed under the contract, but where it remained executory and had not been performed on either side at the time the option to declare void was exercised.

As contended by counsel for appellants, the controlling question in the case is one of construction of the contract and intention of parties. Upon the allegations of the answer admitted by the demurrer it is conceded that the option on the part of the defendants to declare the contract void and return the $1,000 was exercised on the 28th day of February, 1906, and within one day after the execution of the contract. It was certainly competent for the parties thereto to mutually agree to the annulment of the contract in the manner which the parties here agreed, and fix the terms of such annulment. Here the parties did so in clear and unequivocal terms which leave no room for doubt as to their intention, and no reason is perceived why such agreement should not be enforced. 3 Page, Cont. § 1360; *Schwab v. Baremore,* 95 Minn. 295, 104 N. W. 10; *Foster v. Henderson,* 29 Oreg. 210, 45 Pac. 899; *Thayer v. Allison,* 199 Ill. 180. What the rights of the parties under the contract would be if it were executed or partially executed on either side we need not determine, because such a case is not before us.

It is sufficient to say that the answer states a good defense, hence the demurrer thereto was properly overruled.

By the Court.—The order overruling the demurrer is affirmed.

JOHNSON, Respondent, vs. ST. PAUL & WESTERN COAL COMPANY, Appellant.

April 13—April 30, 1907.

Change of venue: Jurisdiction: Stipulation: Damages: Itemizing in special verdict: Pleading: Recovery by parent for injuries to child: Services of wife: Instructions to jury: Excessive damages.

1. In an action by a father for loss of services of his infant son disabled through defendant's negligence it was stipulated that all issues except as to the amount of damages should abide and be determined by the result of an action by the infant based on the same negligent acts, and that if the infant should recover in said action the parties to the action by the father should try and submit the question of the amount of damages "in the above-entitled court," in which the action by the father was pending. Afterwards, in the latter action, defendant filed an affidavit of prejudice of the judge for the purpose of applying for a change of the place of trial or the calling in of another judge, and thereupon, on defendant's motion, the cause was sent to another court for trial. *Held*, that defendant could not be heard to object that the last-named court had no jurisdiction to try the case because of the stipulation.
2. Itemization of unliquidated damages by separate questions in a special verdict is, as a general rule, unnecessary; and the refusal to submit such separate questions in an action for loss of services of an infant son is *held* to have been within the discretion of the trial court.
3. In an action for loss of services, expenses, etc., by reason of plaintiff's infant son having been disabled through defendant's negligence, the complaint alleged that the son was struck by a swinging block and knocked down into the hold of a vessel, resulting in a swelling on his cheek, intense pain, confinement to his bed for six weeks, and a concussion of the spine, and that the injuries were of a permanent nature, etc. *Held* that, giving the complaint a liberal construction, there could be a recovery thereunder of all the damages which in law are consequent upon the breach of duty alleged, and not merely of those resulting from the concussion of the spine.
4. For the services of his wife in nursing his infant son injured through defendant's negligence, a father may recover an amount not exceeding that for which he could have employed others to do the work.

5. In an instruction that the father might recover for expenses necessarily incurred in *caring* for his son during the illness resulting from the injury, including medical services, etc., the word "caring" was clearly used as a synonym for "nursing," and the instruction was proper.
6. An award of $1,000 to a father for loss of services of his son during the four and three-fourths years of the latter's minority remaining after he was injured is *held* not excessive.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

The defendant appeals from a judgment for $1,422.47 damages and costs in an action by the plaintiff for loss of services of his infant son disabled through the negligence of defendant.

For the appellant there was a brief by *Grace & Hudnall,* and oral argument by *George B. Hudnall.*

Victor Linley, for the respondent.

TIMLIN, J. The appellant assigns as error that the trial court had no jurisdiction of the cause, basing that claim upon the fact that during the pendency of an action by the infant against the same defendant to recover for the same negligent acts the parties to this action entered into a written stipulation headed or entitled, "In the Superior Court of Douglas County," and to the effect that all the issues in this case except the issue as to the amount of damages should abide and be determined by the final result of the said action by the infant, and after said judgment in the last-mentioned cause (if in favor of the infant) the parties to this cause should try and submit, upon the pleadings and proceedings as they then stood, the question of the amount of damages in the above-entitled court. Thereafter the defendant filed an affidavit of prejudice against the judge of the superior court, stating therein that the affidavit was made for the purpose of applying for a change of the place of trial or calling in some circuit judge as provided by sec. 2625, Stats. (1898). Upon

this affidavit and motion of the defendant the judge of the superior court sent this cause for trial to the circuit court for the same county, and at the opening of the trial in the circuit court defendant objected to that court proceeding with the trial upon the ground that it had not jurisdiction to hear, try, or determine this cause on account of the stipulation. But the defendant, when it filed the affidavit of prejudice and moved for the change of venue, itself put a construction on the stipulation in question by which it is bound. We cannot presume that the affidavit and motion for change were not made in good faith under the belief that such proceeding was within the purview of the stipulation, and the defendant cannot now be heard to say that there was error in doing that which it requested to have done. We must hold under the circumstances that according to the construction placed upon the stipulation by the defendant and acquiesced in by the plaintiff it permitted a change of the place of trial.

The action mentioned in the stipulation was determined in favor of the infant, and there was therefore nothing to be tried in this cause but the mere question of the amount of plaintiff's damages. No special verdict was requested by the appellant within the time prescribed by sec. 2858, Stats. (Supp. 1906; Laws of 1903, ch. 390), but the trial court did submit a special verdict consisting of one question in these general words: "What sum of money will compensate plaintiff for the damage he has sustained by reason of the injury to his son?" To which the jury answered, "$1,341."

The defendant asked for the submission of other questions to the jury and assigns error because of their refusal. The first of these questions asked for the fact of injury, which was contrary to the stipulation. The second, third, fifth and sixth, and two unnumbered requests calling for the separation of damages accrued up to the time of trial from prospective loss of services were properly refused in the discretion of the circuit court. The fourth, calling for the amount of the an-

nual earnings of the infant paid over to the plaintiff prior to the injury, the seventh, asking the jury to specify the injuries which would cause future disability, the eighth, asking what sum the plaintiff expended for medical attendance and care, and the remaining unnumbered requests, asking the division or itemization of the damages into items for nursing, medical attendance past and prospective, etc., were all properly refused in the discretion of the circuit court. The questions to be submitted for a special verdict should, of course, cover the issuable facts, but beyond this requirement the form of the questions and the degree to which they should go into detail are largely in the discretion of the trial court. *McDougall v. Ashland S.-F. Co.* 97 Wis. 382, 73 N. W. 327; *Schumaker v. Heinemann,* 99 Wis. 251, 74 N. W. 785; *Hebbe v. Maple Creek,* 121 Wis. 668, 99 N. W. 442. As a general rule, no itemization of unliquidated damages by separate questions of the verdict is necessary. *Blesch v. C. & N. W. R. Co.* 48 Wis. 168, 2 N. W. 113.

The complaint averred that a swinging block struck the infant on the cheek and knocked him down thirty feet into the hold of a vessel, where he remained unconscious for some time. It then enumerates as consequences of this (1) a swelling on his right cheek; (2) intense pain; (3) confinement to his bed for six weeks; (4) a concussion of the spine. These are followed by a general averment that the injuries to the infant were of a permanent nature, etc. It is contended that under the stipulation hereinbefore mentioned, and under the general rules of pleading as well, the plaintiff ought not to have been allowed to recover for loss of services, nursing, or medical expenses resulting from anything produced by the injury in question except concussion of the spine. We do not so interpret the scope and meaning of this pleading. The gravamen of the complaint is the wrongful injury to the infant causing disability, causing thereby loss of services and expenses. The disability is not averred to flow alone from con-

cussion of the spine, but from all that was done in knocking the infant into the vessel's hold. We therefore perceive no error in the refusal to charge the jury as requested, or in the charge to the jury as given, upon this construction of the complaint. We feel it our duty under the law to give the complaint a liberal construction to sustain it as a basis for recovery of all the damages which in law are consequent upon the breach of duty averred. *Hart v. Neillsville,* 125 Wis. 546, 104 N. W. 699, and cases in opinion.

Error is assigned because the court refused defendant's request to instruct the jury that the plaintiff was not entitled to recover for the services of plaintiff's wife in nursing the infant, and also because the court did charge the jury in such words as to permit the allowance of this item, as well as other items for caring for, nursing, and medical attendance upon the infant made necessary by the injury in question. If the law regards the right of a father to recover for personal injury to his child merely from the viewpoint of his pecuniary loss of the services or wages of such child, it would seem to follow that his expense in restoring or in attempting to restore the child to a condition in which the child would be able to perform services or earn wages would also be part of his loss, and so we find it adjudged in *Selleck v. Janesville,* 104 Wis. 570, 80 N. W. 944, in the case of a husband suing for loss of services of his wife caused by personal injuries to her, and where the legal right to recover is analogous to that in the case at bar, that the husband may recover the value of his own services in necessary attendance upon his wife, not, however, exceeding the amount for which he could have employed others to do that work. The same rule must apply to the case of a parent seeking to recover his damages for negligent injury to his infant child. His wife's services are his. There was no error in refusing the request under consideration nor in that part of the charge permitting the jury to consider this element of damage.

Objection is made to the use of the words "caring for his son during the illness resulting from the injury." But we regard this word "caring" in this context as a synonym for "nursing." It must be understood to mean the usual attendance upon sick persons which is quite often spoken of as "caring for the sick." Indeed, the learned counsel for appellant who now vigorously criticises the use of this word in the charge of the court himself proposed a question to be submitted to the jury asking them what sum of money, if any, did the plaintiff necessarily expend for medical attendance and *care* of the infant in curing him of said injuries. Here, as in the charge of the court, construing the word with reference to the subject matter of discussion and the context, this meant such care as sick persons require, which is but another way of saying "nursing."

Allowing for the loss of services and nursing, doctor's bill, and money paid for medicine, there was evidence to support the amount of damages awarded. The period of the infant's minority after his injury was four and three-fourths years, and deducting, as counsel for appellant does, $200 for medicine and doctor bill, and deducting $141 for nursing, there would be left $1,000, which divided by four and three-fourths would leave about $210 per year during the period of his minority, which seems not immoderate.

The motion for a new trial was properly denied, and we discover no error in the trial below prejudicial to the appellant.

By the Court.—The judgment of the circuit court is affirmed.

FOWLER, Appellant, vs. METZGER SEED & OIL COMPANY, Respondent.

SAME, Respondent, vs. SAME, Appellant.

April 15—April 30, 1907.

Appeal: Trial contrary to stipulation: Consent of party alleging error: Compulsory reference: Long account: Appealable orders: Taxation of costs.

1 After it had been stipulated by the parties that two actions should be tried together, the pleadings were amended and new issues introduced. On suggestion by the court of the difficulty of trying the cases together, plaintiff's attorney in one of them stated that he was willing to have it tried separately, and it was so tried. *Held*, that as against plaintiff there was no error in such separate trial contrary to the stipulation.

2. Where it appeared that the trial of an issue of fact required the examination of an account on one side containing more than 500 entries and one on the other side containing nearly 100 entries, a compulsory reference was authorized by sec. 2864, Stats. (1898).

3. An order fixing the costs to be inserted in a judgment is not appealable, but is reviewable on appeal from the judgment if the evidence on which it is based and the exceptions thereto are preserved in a bill of exceptions.

APPEALS from a judgment and an order of the superior court of Douglas county: A. J. VINJE, Judge. *Judgment affirmed; appeal from order dismissed.*

This action was commenced August 20, 1903, to recover $2,500 upon an agreement made prior to November 1, 1901, whereby the defendant, a corporation located at Toledo, Ohio, agreed to pay the plaintiff, residing in Superior, for buying flaxseed for the defendant at the rate of one cent per bushel, and in addition thereto to pay to the plaintiff $50 per month, the plaintiff to forward or advance on account of the defendant moneys for the purpose of assisting in the purchase and binding the contracts. The complaint alleged that the plaint-

iff remained in such employ until July 1, 1903; that the defendant failed and neglected and refused to pay the plaintiff the $50 per month or any other sum on or after November 1, 1901; and that there was due to the plaintiff from the defendant for such service $1,000, and also for moneys so advanced by the plaintiff on the purchase of flaxseed from the Dakota Elevator Company, for the use and benefit of the defendant, $1,500, no part of which has ever been repaid by the defendant.

The defendant answered by way of admissions, denials, and counter allegations, and also by way of a counterclaim for $3,755.50 as an alleged balance for moneys advanced by the defendant to the plaintiff in excess of receipts. The plaintiff replied to such counterclaim. Subsequently the complaint was amended by increasing the amount so alleged to have been advanced by the plaintiff from $1,500 to $8,500, and the prayer for judgment to $10,500. The answer was thereupon amended.

It appears that about the time of the commencement of this action another action was commenced by the so-called Dakota Elevator Company, doing business at Superior, against the defendant to recover several thousand dollars by reason of the decline in the market of flaxseed between the times of sales to this plaintiff, *H. T. Fowler,* as defendant's agent, and the defendant's refusal to accept the same, with storage charges and other expenses, the Dakota Elevator Company having, as claimed, sold the flaxseed to other parties at a loss of several thousand dollars. Issue having been joined in that action, on April 9, 1904, this stipulation was entered into by the parties to this action:

"It is hereby stipulated by and between the parties to this action first above entitled shall be placed upon the calendar of the present term of said court, and stand for trial at the same time as the action in which the Dakota Elevator Company is plaintiff, and that both of these actions shall be tried together at one and the same time."

The causes came on for trial before a jury May 5, 1904. Thereupon it was attempted to be proved that the so-called Dakota Elevator Company had been incorporated by amending the articles of incorporation and changing the name of the Terminal Storage Company of Superior to the Dakota Elevator Company, and, being unable to make such proof, the causes were adjourned to May 9, 1904, when the trial was resumed before the same jury. It having transpired that such proof could only be made by an absent witness, the causes were continued to the April term, 1905. The two actions finally came on for trial August 1, 1905, before a new jury. Thereupon counsel for the so-called Dakota Elevator Company announced that he was unable to prove such amendment of the articles of incorporation of the Terminal Storage Company, as such amendment was never filed in the office of the secretary of state or the register of deeds, and so he asked to amend the complaint in that action by making the plaintiff named therein stand as "The Terminal Storage Company, doing business as the Dakota Elevator Company." The court refused to allow such amendment, but otherwise allowed the pleadings in both actions to be amended as mentioned.

On the suggestion of the court that it would be difficult to try the two cases together, the plaintiff in this, the *Homer T. Fowler* case, expressed a willingness to try that case by itself, to which the defendant withheld its assent. The court then held that the two cases could not properly be tried together before the same jury, and thereupon directed the two causes to be tried separately before separate juries.

Thereupon, and after the reading of the affidavit for reference on the part of the defendant and the statement of facts in lieu of an affidavit on the part of the plaintiff, the court granted the defendant's motion for reference in the *Fowler* case, and, with the consent of counsel, appointed T. L. McIntosh such referee to hear proofs, take the evidence, make his findings of fact and conclusions of law, and report the same

to the court for confirmation, and that the official reporter attend said trial as such. Thereupon this cause was tried before the referee, who made his findings of fact and conclusions of law, which, after being modified and corrected, were confirmed by the court, and from the judgment entered thereon in favor of the defendant and against this plaintiff for $4,729.58 damages upon its counterclaim, and costs, the plaintiff appeals to this court.

In taxing costs the clerk of the trial court allowed to the defendant witness fees for its treasurer and secretary, each $47.70, making $95.40, which the trial court by order reversed and set aside and held for naught, and ordered such witness fees to be thereby fully disallowed, with $10 costs of motion. From that order the defendant appeals to this court.

For the plaintiff there were briefs by *Ross & Dwyer* and *Grace & Hudnall,* and oral argument by *George B. Hudnall.*

For the defendant there were briefs by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.*

CASSODAY, C. J. 1. The plaintiff seeks to reverse the judgment upon two grounds, neither of which goes to the merits of the action. One of the errors assigned is that the court improperly ordered the issues in this action and the action of the Dakota Elevator Company against this same defendant to be separately tried, contrary to the stipulation between the parties made April 9, 1904, as set forth in the foregoing statement. This order or direction of the court to try the two causes separately was made August 1, 1905, nearly sixteen months after the making of the stipulation. In the meantime the pleadings had been amended and new issues introduced, especially as to the case brought in the name of the Dakota Elevator Company, a supposed corporation, but the corporate existence of which the plaintiff's counsel conceded in open court he was unable to prove. Besides, when the trial court suggested the difficulty of trying the two cases together, coun-

sel for the plaintiff stated to the court: "We are willing to try this case by itself—the *Homer T. Fowler* case." Again, the court expressed a willingness "to proceed with the trial of either case separately before the jury impaneled to try the action generally, if the parties shall consent; otherwise the court will discharge the jury and impanel a jury in each case separately." Thereupon the same counsel for the plaintiff stated: "The plaintiff is willing to go ahead with the same jury in the case of *Homer T. Fowler* against the *Metzger Seed & Oil Co.*" The only objection came from counsel for the defendant, and he is in no position to assign error on that ground, and he does not. We must hold that there was no reversible error in trying this action by itself and separately from the other.

2. The only other error assigned by the plaintiff is in granting the motion of the defendant for a compulsory reference. The court is authorized, upon the application of either party or of its own motion, to direct a reference whenever the trial of an issue of fact requires the examination of a long account on either side. Sec. 2864, Stats. (1898). The affidavit on the part of the defendant for the reference states, among other things, in effect, that the trial of this action will require the examination of a long account *on each side of the case;* that the plaintiff had been examined under sec. 4096 and his deposition taken, and at that time, in obedience to a subpœna and order, he produced before a court commissioner his books of account and copy books, containing copies of letters, statements of both purchases and shipments of flax to the defendant in November and December, 1901, and entries in relation to the flax alleged to have been purchased for the defendant and not shipped; that the items of said account necessary to examine in the case relate to separate entries of over sixty carloads of flax, and contain the amount shipped, the price, weight, commissions, expense charges, in all covering more than 500 entries; and that the trial will further require the

examination of an account kept by the defendant containing about sixty-five debit entries and twenty-five credit entries. The affidavit is full of details and seems to satisfy all the requirements of the statute. The application for the reference was addressed to the sound discretion of the trial court. We find no abuse of such discretion in granting the reference. The merits of the controversy were not to be determined upon such application. The making of the order of reference is fully justified by the adjudications of this court. *Littlejohn v. Regents,* 71 Wis. 437, 443, 37 N. W. 346; *Sutton v. Wegner,* 74 Wis. 347, 43 N. W. 167; *Briggs v. Hiles,* 79 Wis. 571, 48 N. W. 800; *Lyle v. Esser,* 98 Wis. 234, 239, 73 N. W. 1008; *Winnebago Co. v. Dodge Co.* 125 Wis. 42, 103 N. W. 255.

3. The defendant appeals from the order disallowing and striking out two items of witness fees of $47.70 each. The order so appealed from fixed the costs to be inserted in the judgment, and, of course, must be regarded as having been made before judgment. *Cord v. Southwell,* 15 Wis. 211; *Hoey v. Pierron,* 67 Wis. 262, 30 N. W. 692; *Wheeler v. Russell,* 93 Wis. 135, 139, 67 N. W. 43. In other words, the judgment was incomplete until the costs were determined and inserted therein. Id. Such an order may be reviewed on an appeal from the judgment itself when the errors complained of appear upon the record. *Hoey v. Pierron, supra.* But an order allowing or disallowing costs is not reviewable by this court, unless the evidence upon which it is based and the exceptions thereto are preserved in a bill of exceptions. *Cord v. Southwell, supra; Perkins v. Davis,* 16 Wis. 470; *State v. Wertzel,* 84 Wis. 344, 54 N. W. 579; *Dunbar v. Montreal River L. Co.* 127 Wis. 130, 106 N. W. 389. We must hold that the order in question is not appealable.

By the Court.—The judgment of the superior court of Douglas county is affirmed, and the appeal from the order disallowing certain costs is dismissed.

FAY, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

April 15—April 30, 1907.

Railroads: Negligence: Leaving engine standing in highway: Injury to traveler: Contributory negligence.

1. Defendant left its locomotive standing partly within the limits of a highway, unattended and under a full head of steam, for an unnecessary and unreasonable length of time. As plaintiff attempted to drive past it the pop valve suddenly opened and steam escaped with considerable noise, causing his horse to run away and injure him. The jury found that defendant was negligent in so leaving the engine and that such negligence was the proximate cause of the injury. *Held*, that defendant was liable for the injury. The fright of the horse in such case was not caused by one of the usual noises incident to the ordinary operation of a railway. *Crowley v. C., St. P., M. & O. R. Co.* 122 Wis. 287, distinguished.
2. It is not negligence as matter of law for a person to attempt to drive on a highway across a railway track in front of a locomotive standing still thereon.

APPEAL from a judgment of the circuit court for Polk county: A. J. VINJE, Circuit Judge. *Affirmed.*

This is an action to recover for personal injuries suffered by the plaintiff by reason of being thrown from his buggy. The evidence disclosed the following facts: Keller avenue is the main highway in the village of Amery, Polk county, and runs north and south. The defendant's railroad crosses the highway at right angles. At the point of crossing the highway is thirty-two feet in width and planked for its entire width. The defendant's station and yards are just east of the highway. At about 7 o'clock p. m. on the 30th day of May, 1905, a freight train from the east came into the village on defendant's railroad, and after doing some switching the engine was brought to a standstill at the east side of Keller avenue headed west. The plaintiff's testimony tended to show that the front of the engine projected into the street from six

to ten feet. The engine stood at this place for some time, variously estimated at from fifteen or twenty minutes to half an hour. There was evidence tending to show that it was unattended during this time and that both engineer and fireman were at a restaurant near by eating their supper, but this was denied by the engineer and fireman. While the engine was so standing the plaintiff approached from the south driving a horse and riding in a light buggy with his partner, one Taylor. He attempted to cross the track in front of the engine, and just as he was crossing the pop valve of the engine opened and steam escaped with considerable noise, and the plaintiff's horse jumped and ran away, throwing him out and injuring him. The jury returned the following special verdict:

"*First.* Did the defendant leave its engine partly upon the highway crossing at the time and place in question? Yes. *Second.* If your answer to question 1 is 'Yes,' then was defendant guilty of any want of ordinary care in so leaving its engine? Yes. *Third.* If your answer to question 2 is 'Yes,' then was such a want of care on the part of the defendant the proximate cause of the injuries complained of? Yes. *Fourth.* Was plaintiff guilty of any want of ordinary care that contributed to produce his injuries? No. *Fifth.* If the court is of the opinion that the plaintiff is entitled to recover, then in what sum do you assess his damages? $500."

Judgment for the plaintiff was entered on this verdict, and the defendant appeals.

For the appellant there was a brief by *F. B. Dorothy,* attorney, and *A. H. Bright,* of counsel, and oral argument by *John B. Sanborn.*

For the respondent there was a brief by *Kennedy & Yates,* and oral argument by *W. T. Kennedy.*

WINSLOW, J. A number of errors are assigned, but they all involve the same proposition, namely, that a verdict for the defendant should have been directed because (1) the horse was frightened at one of the usual noises arising in the

course of the operation of a railway, and (2) because the plaintiff was guilty of contributory negligence in attempting to cross in front of the engine. Neither contention can be sustained. The negligence alleged in the complaint was that the engine was left in the highway for an unreasonable length of time while under a full head of steam, and the jury found that it was so left and that such leaving constituted negligence which proximately caused the injury. It is true that it appeared that the horse jumped and ran because of the sudden opening of the pop valve and the consequent escape of steam, and that this is one of the usual incidents of the movement of locomotive engines upon railways. Had this occurred while the engine was being operated in the ordinary transaction of railway business there would doubtless be no liability. *Cahoon v. C. & N. W. R. Co.* 85 Wis. 570, 55 N. W. 900; *Crowley v. C., St. P., M. & O. R. Co.* 122 Wis. 287, 99 N. W. 1016. But the engine was found to be partially upon the public street when the valve opened. The railway company had a right to use the street for legitimate railway purposes, but it had no right to leave its engine or cars standing upon the street for an unnecessary and unreasonable length of time in such condition as to unnecessarily endanger the safety of travelers thereon. *Bussian v. M., L. S. & W. R. Co.* 56 Wis. 325, 14 N. W. 452. This was the act which was claimed and found to be an act of negligence proximately causing the injury. The opening of the valve and the escape of steam was but an incident. It was a thing shown to be likely to happen when the engine is allowed to stand still for a time under a full head of steam. The likelihood that it would happen while the engine was occupying a part of the street and teams were passing was a matter legitimately bearing on the question whether the act of allowing the engine to stand on the street was negligent. The primal act of negligence, however, was logically the unnecessary use of the street as a mere standing place for the engine while it was steamed up and in such

a condition that the opening of the pop valve and the increased probability of the frightening of horses was naturally to be expected. In the *Crowley Case,* above cited, which is somewhat relied upon by appellant, no such ground of liability was pleaded, and for this reason the question here presented was not deemed to be in the case.

As to the alleged contributory negligence, we cannot say that it is contributory negligence as matter of law for a person to attempt to cross in front of a locomotive standing still as the plaintiff did in this case. It was properly a question for the jury. *Bussian v. M., L. S. & W. R. Co., supra; Heer v. Warren-Scharf A. P. Co.* 118 Wis. 57, 94 N. W. 789.

By the Court.—Judgment affirmed.

ARND, Appellant, vs. SJOBLOM, Respondent.

April 15—April 30, 1907.

Note taken in violation of statute: Rights of* bona fide *holder.

A note taken for lightning rods, but not having on its face the statement of such consideration required by ch. 438, Laws of 1903, is valid and enforceable in the hands of an innocent holder for value.

APPEAL from a judgment of the circuit court for Polk county: A. J. VINJE, Circuit Judge. *Reversed.*

Suit on ordinary promissory note, dated July 26, 1906, negotiable in form. Plaintiff gave evidence that he was an innocent purchaser for value before due with no notice of any defense or invalidity. It was stipulated that the note was in fact given in payment for lightning rods erected upon defendant's buildings in accordance with a prior written contract made by the defendant, whereupon, on motion of defendant, judgment of nonsuit was entered dismissing the action, from which the plaintiff appeals.

For the appellant there was a brief by *Frank B. Dorothy,* and oral argument by *John B. Sanborn.*

For the respondent there was a brief by *Kennedy & Yates,* and oral argument by *W. T. Kennedy.*

DODGE, J. The constitutionality of ch. 438, Laws of 1903, as applied to notes given for lightning rods, is settled by *Quiggle v. Herman, ante,* p. 379, 111 N. W. 479, marking the distinction from its application to patent rights considered in *J. H. Clark Co. v. Rice,* 127 Wis. 451, 106 N. W. 231.

Appellant contends that a note taken in disobedience of the statute above referred to, negotiable in form, and having nothing upon its face to indicate its consideration or that it had been given in breach of such a statute, is valid and enforceable in the hands of an innocent holder for value. This contention is met by the respondent by the assertion that such note has already been declared to be void by this court in *J. H. Clark Co. v. Rice, supra,* at page 458 (106 N. W. 234), and that a note absolutely void has no existence and can gain no validity by its negotiation even to an innocent holder for value before maturity, and to this proposition he cites *Chapin v. Dake,* 57 Ill. 295; *Weed v. Bond,* 21 Ga. 195; *Cunningham v. Nat. Bank,* 71 Ga. 400; *Snoddy v. Am. Nat. Bank,* 88 Tenn. 573, 13 S. W. 127; *Traders' Bank v. Alsop,* 64 Iowa, 97, 19 N. W. 863; *Bayley v. Taber,* 5 Mass. 286; *Bridge v. Hubbard,* 15 Mass. 96; *Kendall v. Robertson,* 12 Cush. 156, to which perhaps he might have added *Walker v. Ebert,* 29 Wis. 194; *Kellogg v. Steiner,* 29 Wis. 626; *Keller v. Ruppold,* 115 Wis. 636, 92 N. W. 364. We shall not deem it necessary to decide whether a promissory note or other contract given in disobedience of a statutory provision, where the statute is accompanied by a penalty upon its disobedience, is absolutely void in the absence of any statute declaring it so. That general subject with many of the authorities bearing upon it is discussed in the case of *Laun v. Pac. Mut. L. Ins.*

Co., ante, p. 555, 111 N. W. 660, also in *Union T. Co. v. Preston Nat. Bank,* 136 Mich. 460, 99 N. W. 399, and *Sondheim v. Gilbert,* 117 Ind. 71, 18 N. E. 687. It should be noted, however, that the question of the validity of a note given in defiance of the statute above mentioned, if that statute were valid, was not the subject of consideration or decision in *J. H. Clark Co. v. Rice, supra.* The remark that such a note was doubtless void if the statute were valid was a mere concession from which the court proceeded to consider the constitutionality of the statute itself. And even were that an authoritative decision, there might well be doubt whether it was intended to declare the instrument void in circumstances other than then under consideration, namely, as between the original parties. The word "void" is often used in the sense of invalid rather than nonexistent.

Conceding, for the purposes of the discussion, that because the giving of a note for lightning rods without red-ink declaration of its consideration upon its face is in defiance of ch. 438, Laws of 1903, it is thereby rendered invalid, as we have decided is a note executed on Sunday (*Howe v. Ballard,* 113 Wis. 375, 89 N. W. 136, and *Brown v. Gates,* 120 Wis. 349, 351, 97 N. W. 221, 98 N. W. 205), does it necessarily follow that an innocent holder for value cannot recover thereon? It was early decided by this court that a negotiable note, invalid between the original parties because given in defiance of a statutory prohibition accompanied by a penalty—*i. e.* one given on Sunday, but dated on Saturday,—would be enforced in the hands of an innocent holder having no knowledge of the illegal fact upon the ground of estoppel against the maker to assert such fact. *Knox v. Clifford,* 38 Wis. 651. The same principle has been invoked to support a usurious negotiable note in the hands of an innocent holder, although the statute declared it "void." *Sage v. McLaughlin,* 34 Wis. 550, 556. The general grounds upon which estoppel *in pais* rests are described in *Marling v. Nommensen,* 127 Wis. 363, 369, 106

N. W. 844. Hardly anything is more to be anticipated than that a negotiable note will be negotiated upon the faith of what appears upon its face (*Loizeaux v. Fremder,* 123 Wis. 193, 198, 101 N. W. 423); and the very issue of such paper without suggestion of any facts affecting its validity must be expected by every reasonable person to lead any purchaser to assume their nonexistence. The doctrine of *Knox v. Clifford, supra,* has been acted on by numerous other courts. *Cranson v. Goss,* 107 Mass. 439; *Vinton v. Peck,* 14 Mich. 287; *Hall v. Parker,* 37 Mich. 590, 594; *Johns v. Bailey,* 45 Iowa, 241, 245; *Leightman v. Kadetska,* 58 Iowa, 676, 12 N. W. 736; *New v. Walker,* 108 Ind. 365, 9 N. E. 386—the last case being decided under substantially the same statute as the one now invoked. Other decisions affirming the validity of commercial paper in hands of innocent holder, notwithstanding illegality and consequent original invalidity, are *Union T. Co. v. Preston Nat. Bank,* 136 Mich. 460, 99 N. W. 399; *Traders' Bank v. Alsop,* 64 Iowa, 97, 19 N. W. 863; *Johnson v. Meeker,* 1 Wis. 436, 441; *Mack v. Prang,* 104 Wis. 1, 79 N. W. 770; *Keller v. Schmidt,* 104 Wis. 596, 602, 80 N. W. 935. We feel no doubt that the principle of *Knox v. Clifford* is sound and supports the right of this appellant to recover upon the facts as they appeared at the time of the nonsuit.

Further than this, our negotiable instrument statute, sec. 1676—27, Stats. (Supp. 1906; Laws of 1899, ch. 356), provides:

"A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon except as provided in secs. 1944 and 1945 of these statutes, relating to insurance premiums, and also in cases where the title of the person negotiating such instrument is void under the provision of sec. 1676—25 of this act."

Sec. 1676—25 applies only to the case where the signer did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care. Secs. 1944, 1945, refer to a note given for an insurance premium, which by said sections is required to bear upon its face a declaration of its consideration, and omission thereof is penalized. But for these express exceptions the provision is general that the innocent holder may enforce payment for the full amount free from defenses available between the original parties. Such specific exceptions strongly indicate that no others were intended. We cannot escape the conclusion that this statute supports plaintiff's right of recovery.

By the Court.—Judgment reversed, and cause remanded for new trial.

SHAW and others, Appellants, vs. WARD and another, Respondents.

April 15—April 30, 1907.

Waters: Right to discharge surface water upon lands of others: Damages: Equity.

1. The common-law doctrine as to the right of a landowner to protect his premises from surface water and to rid the same thereof in a reasonable way, even though consequential injuries may thereby be caused to other lands, is the law of this state, subject only to the limitation declared in *Pettigrew v. Evansville*, 25 Wis. 223, that one landowner cannot rightfully collect surface water on his premises in a reservoir and then discharge the same directly upon or near to the lands of another so that it will reach such lands in a large volume to the material injury thereof.
2. The mere change of the surface of one's premises where reasonably necessary to cause surface water to flow therefrom by the natural course of drainage, even to the extent of causing it to pass to adjoining lands in a ditch, is not an accumulation of water and casting of it upon adjoining land within the doctrine of *Pettigrew v. Evansville, supra.*

3. Defendants' lands contained a basin or depression to which surface waters from surrounding lands as well as their own flowed and in which, under natural conditions, such waters were to some extent retained except when, in periods of drouth, they evaporated or were absorbed into the ground. When the waters in the basin reached a certain height they overflowed through an old ditch or draw across defendants' lands and the lands of others (including plaintiffs) to a creek some distance away. *Held*, that defendants had the legal right to prevent such accumulation and retention of surface waters on their land by causing the same, by such means as were reasonably necessary—such as the digging of a ditch or the deepening of the existing one,—to flow in the natural course of drainage to and upon adjoining lands, and for injuries to other lands caused by their so preventing subsequent accumulation of surface water on their own lands they are not liable.
4. If there was any liability in such a case for injuries to the lands of plaintiffs caused by the discharge, at the time of opening a ditch into the basin, of the waters then accumulated therein, which passed to plaintiffs' lands across the lands of others in an artificial drain for which defendants were not responsible and at a time when plaintiffs were in the attitude of assenting to the existence of such drain and ditch as a town drain, such liability is not an independent ground for equitable interference nor enforceable in an action to compel a restoration of the former condition.

APPEAL from a judgment of the county court of Jefferson county: GEORGE GRIMM, Judge. *Affirmed.*

Equitable action for a mandatory injunction compelling defendants to close up a ditch made to drain surface water from their lands whereby it flowed by way of adjoining lands to the lands of appellants, and to recover damages.

The facts as found by the court are as follows:

"1. That the plaintiffs are owners in common of the N. W. ¼ of section 30 and other lands in the town of Cold Spring, and of the E. ½ of the S. W. ¼ of the S. E. ¼ of section 24, in the town of Koshkonong, all in said Jefferson county; and that the defendant *John Kyle* is the owner of the S. W. ¼ of said section 24, and the defendant *Michael Ward* is the owner of the west ½ of the N. W. ¼ of section 25 in said town of Koshkonong; and that said parties have been the owners and occupants respectively of said lands for more than five years prior to the commencement of this action.

"2. That there is a natural reservoir or pond covering from five to fifteen acres of land, about one half of which is in the S. W. corner of said one-fourth section owned by the defendant *Kyle,* and the other half in the northwest corner of said eighty acres owned by the defendant *Ward.*

"3. That said reservoir or pond is in the center of a basin of several hundred acres of land surrounded by uplands sloping towards said basin.

"4. The natural outlet for the waters accumulating in said basin is southeasterly from said lands owned by the defendants across the land owned by the plaintiffs in the town of Cold Spring, and into Galloway creek.

"5. That the lands of the defendants lie approximately thirty-seven feet higher than said Galloway creek, and fifteen feet higher than the town-line road between the towns of Koshkonong and Cold Spring.

"6. That for many years prior to the injury complained of in this action there existed an artificial ditch running from said reservoir or pond southeasterly substantially upon the line of the ditch or drain now complained of, and had prior to the construction of the new ditch to a considerable extent filled up through natural sources.

"7. That said reservoir or pond when filled from melting snow or heavy rains to a depth in excess of one foot would overflow down and along said old ditch and upon the course of said new ditch, but that said old ditch was not of sufficient depth to entirely drain said pond or reservoir, but would leave the water therein to a depth of about one foot to soak into the soil or evaporate.

"8. That prior to the construction of said new ditch said pond dried out only during periods of long-continued drouth.

"9. That the plaintiffs' twenty-acre tract in said section is about four feet lower than said reservoir and basin, but that it is marsh land and was, prior to the construction of the ditch complained of, at times to a large extent covered by water.

"10. That near and east of said reservoir or pond there was a smaller depression located upon the land of the defendant *Kyle.*

"11. That prior to the construction of the ditch herein complained of, to wit, in the spring of 1903, the defendant *Ward* proceeded to clean out and deepen the said old ditch upon the

lands of the defendant *Kyle,* commencing at the east boundary line, and did clean out and deepen the same up to said little pond; that one Chesebro, owning marsh land adjoining said twenty-acre tract of the plaintiffs in said section 24 and between which lands said old ditch ran, complained in person to said *Ward* that cleaning and deepening of said old ditch was injuring his marsh by carrying an unusual amount of water thereon; and that thereupon it was agreed between said *Ward* and Chesebro to stop work until a drain could be constructed by authority of the town board.

"12. That thereafter, to wit, on the 20th day of June, 1903, application was duly made to said town board to lay out and construct a town drain upon the line of the ditch or drain herein complained of, and that on the 31st day of July, 1903, said town board made an order for the laying out of said ditch or drain, and on the 19th day of August, 1903, filed the usual maps and surveys together with an order assessing the benefits and damages of the respective parties, etc.

"13. That there was assessed to the plaintiffs herein upon their said twenty-acre tract of marsh the sum of $74.06 as benefits.

"14. That said plaintiffs thereafter themselves dug and constructed a large section of said ditch or drain so laid out by said town board, and herein complained of, which adjoined their lands, and were paid therefor by a town order in an amount a little less than the benefits assessed against their said lands, and which money so paid to them was collected from them through the tax list.

"15. That said ditch or drain herein complained of was substantially completed from the town line between the towns of Koshkonong and Cold Spring, up to and beyond the plaintiffs' said twenty-acre tract, and up to and into the lands of the defendant *Kyle,* during the summer and fall of 1903, but that it was not fully extended into said reservoir or pond and to its western limit until the spring of 1904.

"16. That prior to the commencement of this action said ditch or drain had completely emptied said reservoir or pond on defendants' lands and that the area formerly occupied by it has become plough land suitable for general farming purposes and that the digging of the west end of said ditch, by which said pond was finally emptied, was done by the defendants.

"17. That the spring and summer seasons of 1904 and 1905 were unusually wet, *i. e.* that there was an unusual amount of rainfall.

"18. That by reason of the completing of said town drain into said reservoir or pond and by reason of said excessive rains an unusual amount of water passed through said ditch or drain during the said season of 1904 and 1905, and more rapidly than it would have passed if said ditch or drain had not been opened, and that by reason thereof plaintiffs' lands in the town of Cold Spring lying between the said town line and said Galloway creek had thrown upon them more water than a small ditch therein, leading across the same, was able to carry, and that a tract of about fifteen acres of marsh land thereby became unusually wet and soggy, and was injured for pasturing and other farming purposes.

"19. That said small ditch across plaintiffs' land last referred to, prior to the spring of 1904, had become partly closed up by cattle walking through the same and by natural sources, and that by reason of some soil being carried down through said drain or ditch said small ditch became almost wholly closed; that a causeway about twelve rods in length built across the fifteen acres on plaintiffs' land last referred to, was washed away and became useless, and that by reason of the washing away of said causeway plaintiffs lose the use for pasturing purposes of a five-acre tract of land lying southerly and somewhat higher than said fifteen acres.

"20. That plaintiffs suffered damages by reason of the construction of such ditch to their said lands in the town of Cold Spring and by reason of the partial filling up of the small ditch across the same and the washing away of said causeway in the sum of $125, prior to the commencement of this action.

"21. That by reason of said ditch or drain, about sixteen acres of plaintiffs' twenty-acre tract in section 24 before referred to were materially benefited, to wit, in the sum of $50, prior to the commencement of this action.

"22. That if said small ditch be reopened (the expense of which I include in my finding of paragraph 20) the plaintiffs will suffer no future damages in excess of the benefits which will accrue to their twenty-acre tract in the town of Koshkonong.

"23. That during the laying out of said ditch or drain and during the construction thereof, of all of which plaintiffs had knowledge, they brought no proceedings to prevent the same.

"24. After the greater part of said damage had been done to plaintiffs' low lands in the town of Cold Spring (which I find was in the spring of 1904, when the pond was tapped and emptied by completing the ditch as laid out), to wit, on the 15th day of November, 1904, the plaintiffs presented to this court a petition for a writ of *certiorari* to bring up for review and determination the proceedings of said board of supervisors of the town of Koshkonong relating to the laying out of said ditch; that such writ was issued and returned; and that such proceedings were had thereafter, to wit, on the 27th day of April, 1905, that this court adjudged the proceedings of said town board in laying out said town ditch or drain (the drain or ditch herein complained of) to be null and void for the reason, among other things, that said board had not found that said ditch or drain would conduce to the public health or welfare.

"25. That a notice signed by the plaintiffs, marked 'Exhibit 8' and directed to the defendant *Michael Ward* and to one A. Chesebro and others, notifying them that the proceedings of the town board of supervisors in laying out the said ditch or drain had been judicially declared void and requiring them to discontinue said ditch or drain, was served on the defendant *John Kyle* on or about the 12th day of May, 1905; that a similar notice also signed by the plaintiffs, marked 'Exhibit 9,' was served on defendant *Michael Ward* in the spring or summer of 1905."

Upon such findings it was concluded, as matter of law, as follows:

"The plaintiffs by reason of participating in constructing the ditch and not preventing its construction by moving in a reasonable time and before defendants had expended a large amount of money or labor are estopped from recovering damages which the same has caused and from having equitable relief as prayed for in the complaint. The defendants are entitled to judgment dismissing the complaint with costs."

Judgment was entered accordingly.

The cause was submitted for the appellants on the brief of

L. B. Caswell and *W. H. Rogers,* and for the respondents on that of *Edwin T. Cass,* attorney, and *Harlow Pease,* of counsel.

MARSHALL, J. The findings are somewhat involved. In the second paragraph it is said, there is a natural reservoir or pond covering five to fifteen acres on respondents' lands, and in the sixteenth finding it is said, prior to the commencement of this action the territory formerly covered by water and constituting the bed of the pond had become dry land suitable for agricultural purposes. From the findings as a whole, however, it is quite clear that this is the situation: There is on respondents' lands a depression covering several acres and of the depth of about one foot, toward which, under natural conditions, surface water from a considerable territory, including lands of respondents, flowed and in which the same, to the level of a draw to the east, was retained, the surplus entering such draw and flowing somewhat southeasterly to and onto lands adjoining on the east; thence across the latter lands for a distance of half a mile or more to lands of appellants claimed to have been damaged; thence, except as retained on such lands, flowing further on to Galloway creek east of such lands. The water retained in the depression or basin as aforesaid did not constitute a permanent body. It was not fed to any extent by springs, but was mere surface water which in times of dry weather disappeared by evaporation or absorption into the ground. The damage caused to appellants by discharging the water accumulated in the basin, at the time the ditch was opened into it, was produced long before the action was commenced and at a time when appellants were in the attitude of submitting to the existence of the improvement, and by the water reaching their lands in the artificial course for which respondents were not responsible. If there is any liability for such damages, under the circumstances, it is not an independent ground for equitable interference nor

enforceable in an action to compel a restoration of the former condition, if a continuance of the improvement of respondents' lands be not wrongful as to appellants. That is deemed too clear to require discussion. For a considerable period of time before this action was commenced there was no pond of water on respondents' lands and none will be accumulated there in the future unless the flow to the adjoining lands be prevented.

From the foregoing it will be seen that the major purpose of this action is not to prevent the casting of a pond of water, accumulated on respondents' lands, therefrom, resulting in its reaching appellants' lands to their damage, but is to compel the restoration of the reservoir on the former's lands so the surface water falling or flowing thereon will, as formerly, be there retained instead of passing to the lands of the adjoining owners and thence to those of appellants.

Thus the case really involves the question of whether respondents have a legal right, for the purpose of enjoying their own lands for the use the same are adapted to, to prevent surface water cast thereon, largely from the premises of others, from accumulating and remaining in the depression referred to, by causing the same to flow by the natural and necessary course of drainage to adjoining lands, by way of which, through an artificial course for which respondents are not responsible, the same reach the lands of appellants.

Enough has been said to show that the doctrine of *Pettigrew v. Evansville,* 25 Wis. 223, as it has been limited, and similar cases, viz.: that one landowner cannot rightfully collect surface water on his premises in a reservoir and then discharge the same directly onto the land of another to his injury, or onto land near the premises of another so that it will reach the same in a large volume to the material injury thereof, do not fit the case, but the common-law doctrine, so often approved by this court, in respect to the right of one landowner to defend his premises against and rid the same of

surface water, though consequential injuries may thereby be caused to other lands, subject to the limitation mentioned in *Pettigrew v. Evansville, supra,* governs the situation.

The following statement of the common-law rule early announced by the Massachusetts court in *Gannon v. Hargadon,* 10 Allen, 106, 109, has been quoted here with approval on many occasions:

"The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow."

There is some language in *Borchsenius v. C., St. P., M. & O. R. Co.* 96 Wis. 448, 71 N. W. 884, perhaps not wholly in harmony with that rule, but it will be seen that the opening lines of the opinion state the right involved quite as broadly as it is stated in the quoted words. This is the language used:

"Surface water is recognized as a common enemy, which each proprietor may fight off or control as he will or is able, either by retention, diversion, repulsion, or altered transmission; so that no cause of action arises for such interference, even if some injury occurs, causing damage."

That is followed by the statement, in effect, that such general rule has its limitation, as declared in *Pettigrew v. Evansville,* 25 Wis. 223, the scope of which, however, is not stated with perfect accuracy. We shall not discuss at length *Borchsenius v. C., St. P., M. & O. R. Co.,* though will say, in passing, that the doctrine of this court on the subject treated is much more accurately stated in other cases. The right of a landowner as to protecting his premises from surface water

extends to expulsion of all such water coming upon such premises by flowing from other lands or otherwise, and of repulsion as well, subject to the precise limitations covered by the decision in the *Pettigrew Case,* and to the reasonable exercise of the right.

The common-law rule as it has been quoted is in express terms or effect, subject only to the limitation stated, fully approved in the following cases: *Lessard v. Stram,* 62 Wis. 112, 22 N. W. 284; *Heth v. Fond du Lac,* 63 Wis. 228, 23 N. W. 495; *Johnson v. C., St. P., M. & O. R. Co.* 80 Wis. 641, 50 N. W. 771; *Champion v. Crandon,* 84 Wis. 405, 54 N. W. 775; *Clauson v. C. & N. W. R. Co.* 106 Wis. 308, 82 N. W. 146; *Connell v. Stark,* 108 Wis. 92, 83 N. W. 1092.

The mere change of the surface of one's premises where reasonably necessary to cause surface water to flow therefrom by the natural course of drainage, even to the extent of causing it to pass onto adjoining premises in a ditch, is not understood to be the accumulation of water and casting it upon adjoining land within the doctrine of *Pettigrew v. Evansville, supra,* as will be seen by an examination of the opinions in *Johnson v. C., St. P., M. & O. R. Co.* and *Clauson v. C. & N. W. R. Co.*

While there is much authority that the common-law rule is not to be so understood as to permit an upper proprietor under any circumstances to expel surface water from his premises as it comes thereon in a stream, it is considered that the logical scope of such rule and its reasonable administration extends to doing so, where there is no other reasonable means of the landowner enjoying his property for the purposes for which it is adapted and especially where there is no great damage to the lands of others not avoidable by the exercise of the same right. That is to say, so long as a landowner acts reasonably in ridding his premises of surface water the common-law rule should be applied as it reads, subject to the one exception mentioned in *Pettigrew v. Evansville, supra.* The

position of this court in respect to the matter is tersely stated in the headnote to *Johnson v. C., St. P., M. & O. R. Co., supra,* thus:

"The owner of land, for the purpose of securing or protecting its reasonable use and enjoyment, may obstruct or divert surface waters thereon, and which have come down from higher levels, by embankments, ditches, drains, culverts, and other constructions, and in doing so may lawfully hinder the natural flow of such waters and turn the same back upon or off on to and over the lands of other owners, without liability for injuries ensuing from such obstruction or diversion."

The court in the opinion said:

"The doctrine here sanctioned is that one proprietor may turn and divert surface water from his own land onto the land of another, and such other proprietor may turn and divert the same waters onto the land of his adjacent neighbor, and so on. Each proprietor may thus pass on surface water, and there is no remedy except in doing so."

The doctrine as above stated has been very broadly applied in some other jurisdictions, notably in Minnesota. *Jordan v. St. Paul, M. & M. R. Co.* 42 Minn. 172, 43 N. W. 849; *Sheehan v. Flynn,* 59 Minn. 436, 61 N. W. 462; *Gilfillan v. Schmidt,* 64 Minn. 29, 66 N. W. 126; *Oftelie v. Hammond,* 78 Minn. 275, 80 N. W. 1123. *Sheehan v. Flynn* carried such doctrine much farther than is necessary in this case. There was on the defendant's land a depression into which surface water naturally accumulated till it covered about twenty-four acres, and to the depth of about four feet at the lowest point of such depression, the surplus flowing over the brink of the depression and down a natural draw off from the defendant's land. The water in the basin, in times of dry weather, entirely disappeared, as in this case. The proprietor tapped the basin by a ditch about ninety rods long and of a sufficient depth to empty the reservoir and to thereafter prevent the surface water from accumulating. By way of the ditch water passed off from defendant's land and in its course,

thereafter, reached the plaintiff's land, to its injury and his damage to some extent. The court held that under all the circumstances the defendant only exercised the right to reasonably enjoy his own property, not doing any unreasonable or unnecessary injury to the property of others.

It is recognized by some writers, as perhaps the fact is, that this court has taken a very broad view of the common-law rule. So far as it is thought that the court has gone beyond such rule such writers, it seems, are mistaken. We observe that it is said in the note to *Gray v. McWilliams,* 21 L. R. A., at page 600:

"The Wisconsin court has reached a peculiar position on this question. While professing to follow the so-called common-law rule of noninterference it has decided that surface water on one's premises, including that which has been thrown there from higher land, may be lawfully drained and diverted from such land to the land of another, and the only remedy of the latter is to pass it on to other lands."

The mistake, it seems, lies, chiefly, in the idea that the common-law rule is confined to noninterference. Certainly the doctrine that surface water is a common enemy which every proprietor may fight or get rid of as best he may, and that "the right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, . . . is not restricted or modified by the fact that his own land is so situated . . . that an alteration in the mode of its improvement or occupation . . . will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow," cannot be legitimately confined to noninterference. The comment referred to on the position of this court is merely the result, it seems, of a too narrow view of the common-law rule. Here it is

given the legitimate effect, it is thought, which the language employed to state it in *Gannon v. Hargadon,* 10 Allen, 109, suggests.

No reason is perceived why respondents could not rightfully have filled up the depression on their lands preventing the water from accumulating thereon and causing it to pass on to the east and reach appellants' lands by way of the ditch, or to have at any time opened the basin into the draw, or a ditch if necessary, to the east and emptied the reservoir, being responsible, if at all, for the damages thus caused to others, but not for damages caused by the improvement preventing surface water from subsequently being retained on their lands, or, at a time when the pond had disappeared by evaporation and absorption, have opened the basin towards the natural draw so as to prevent a future accumulation.

From the foregoing it seems that the judgment appealed from is right regardless of the precise ground upon which the trial court based it. Respondents have a legal right, as we have seen, to rid their lands of surface water as it comes thereon from any source by permitting or causing the same, by such means as may be reasonably necessary, to flow in the natural course of drainage to and onto adjoining lands, though the same may by natural or by artificial means for which they are not responsible reach and spread out over appellants' lands. In so doing they but exercise the common right of every person to defend his premises against surface water. If consequential damages, from the exercise of such right, occur to appellants, they are remediless except by the exercise of the same right, so far as conditions render that feasible, upon their own premises.

By the Court.—The judgment is affirmed.

BOYDEN and others, Appellants, vs. ROBERTS and others, Respondents.

February 19—May 21, 1907.

Agreement restricting use of land: Equitable servitude: Enforcement by subsequent purchasers inter sese: *Notice: "Conveyance" entitled to record: Violation of agreement: Maintenance of clubhouse, etc.*

1. Where an instrument restricting use was executed in pursuance of a general scheme for the purpose of preserving the character of real estate as first-class residence property "by present owners and future purchasers of the same," the restriction created an equitable servitude.
2. Such a restriction must be regarded as of value to the whole property and inserted for the benefit of those who become owners of separate parcels, and is binding in equity on a grantee of a portion of the premises with notice.
3. Where a covenant in the form of a restriction is appurtenant to the land, the right to enforce it in equity passes with the land.
4. The doctrine of equitable servitude is one largely of intention to be deduced from the agreement.
5. The controlling question in determining whether an equitable servitude exists is whether the original parties so intended.
6. The form of an agreement used to create a restriction in the nature of an equitable servitude is not material. Words of covenant are as effectual as words of grant.
7. The owner of a tract of land with lake frontage, at the time of conveying a portion thereof and as part of the same transaction, made an agreement with the grantee that the character of the whole tract as first-class residence property should be preserved by them and by future purchasers, and that no part thereof should at any time be occupied, sold, or used by either of them or their heirs, executors, or assigns for hotel, club, or camping purposes, or for any reformatory, charitable, or penal institution. The agreement provided that it should be binding upon the respective heirs, executors, administrators, and assigns of the parties thereto and should constitute a covenant running with the land. The deed made no reference to the agreement. *Held*, that the instruments, construed together, impressed upon the whole tract and upon every part thereof an equitable servitude for the benefit of all purchasers and binding upon all purchasers having notice thereof, and that the specified restrictions upon the use of the property could be enforced by

subsequent purchasers of parcels of the portion originally retained by the owner against other such purchasers chargeable with notice of the agreement, although all claimed under mesne conveyances from such owner containing no restriction and no reference to the agreement.

8. The restriction being for the benefit of all portions of the property, each purchaser took his portion with the right to enforce the restriction against other grantees of portions of the property with notice.

9. No reference to the agreement in deeds of portions of the premises was necessary in order to enable grantees with notice to enforce the restriction *inter sese*.

10. Said agreement being an instrument "by which the title to any real estate may be affected in law or equity," was a "conveyance" as defined in sec. 2242, Stats. (1898), and the record thereof was constructive notice to all subsequent purchasers.

11. The maintenance on said tract of a neighborhood clubhouse for social purposes in connection with golf grounds, and of a pier and boat landing for the accommodation of members and their families and guests, would constitute a violation of said agreement.

[Syllabus by KERWIN, J.]

WINSLOW and DODGE, JJ., dissent.

APPEAL from a judgment of the circuit court for Walworth county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This action was brought to quiet title to certain land owned by the plaintiff *Edward G. Uihlein* against claim of defendants that a restriction existed limiting the use, created by a certain agreement hereafter designated as the Johnston-Weiss agreement. The defendants answered, among other defenses, by way of counterclaim, setting up the agreement and demanding affirmative relief against the violation thereof by the plaintiffs. The plaintiffs replied to the counterclaim, and the case was submitted to the court upon the pleadings, stipulation of parties, and depositions of John Johnston, Jr., and George A. Weiss. The facts established by the admission of parties and the findings are substantially as follows:

On May 1, 1891, one John Johnston, Jr., became the owner of about 106 acres, known as Forest Glen, situate on the north shore of Geneva Lake in Walworth county, Wiscon-

sin, and having a shore line of about 2,000 feet, which tract included all the lands referred to in the pleadings herein and owned by any of the parties to this action. On October 20, 1892, Johnston sold and conveyed 13.41 acres of said land, being about 700 feet of the shore, to George A. Weiss, and as a part of said transaction Johnston and Weiss entered into the following agreement:

"This agreement, made and entered into the 20th day of October, 1892, by and between John Johnston, Jr., of the city of Chicago, county of Cook, and state of Illinois, of the first part, and George A. Weiss, of the same place, of the second part, witnesseth: Whereas, said John Johnston, Jr., is the owner of certain real estate situated in section eleven (11), township one (1) north, of range sixteen (16) east, in the county of Walworth and state of Wisconsin, said property being otherwise known as Forest Glen, and being more particularly described in a deed executed by Joel C. Rockwell to said John Johnston, Jr., under date of May 1, 1891, and which deed is recorded in the recorder's office of said county, in volume eighty-one (81) of Deeds, page 590; and whereas, said Johnston has sold a portion of said property to said Weiss and is about to convey the same to him by deed bearing this date; and whereas, it has heretofore been and is now agreed and understood between said parties that the character of all of said property known as Forest Glen as first-class residence property shall be preserved by the present owners and future purchasers of the same: Therefore, and in consideration of one dollar ($1) by each of said parties paid to the other, the receipt whereof is hereby acknowledged, it is hereby covenanted and agreed between said parties for themselves and their respective heirs, executors, administrators, and assigns, that no part or portion of said Forest Glen property hereinbefore mentioned shall at any time be occupied, sold, or used by them, or either of them, or by either of their heirs, executors, administrators, or assigns, for hotel, club, or camping purposes or for any reformatory, charitable, or penal institution. This agreement shall be binding upon the respective heirs, executors, administrators, and assigns of the parties hereto, and shall constitute a covenant running with the land."

Both the deed from Johnston to Weiss and the agreement were duly signed, sealed, witnessed, and acknowledged so as to be entitled to record, and were filed for record in the office of the register of deeds of Walworth county, Wisconsin, on the 7th day of November, 1892, and duly recorded. The land referred to in the agreement of October 20, 1892, as about to be conveyed by said Johnston to Weiss was the identical land described in the deed of same date from Johnston to Weiss, but such deed contained no reference to the Johnston-Weiss agreement. At the time of the execution of said agreement Geneva Lake was an attractive and much frequented summer resort, and property situate upon its shore was greatly sought after for summer residences. After recording said deed and agreement Weiss erected upon the property conveyed to him an expensive summer residence and thereafter occupied it during the summer months until sold in September, 1899, to plaintiff *Uihlein;* and in said deed conveying the premises was inserted the following:

"Subject also to an agreement regarding the use of said property entered between John Johnston, Jr., and said George A. Weiss on the 20th day of October, 1892, and recorded in the office of the register of deeds for Walworth county, state of Wisconsin, in volume 65 of Mortgages, on page 435."

Defendants *John Roberts, Jeremiah J. Mogg,* and *Millard E. Mogg* are each owners of separate parcels of land situate on the north shore of Geneva Lake, and formerly constituting parts of Forest Glen, title to which each of them acquired through mesne conveyances from Johnston subsequent to the execution and recording of said Johnston-Weiss agreement, but none of said conveyances contained any reference to said agreement. At the time of their purchases, respectively, each of said defendants was furnished with an abstract of title to the premises and upon each abstract was shown said agreement. Said abstracts were examined and title accepted with full knowledge of said agreement and believing it to be in

force and valid. Said *Roberts* and *Millard E. Mogg* had personal knowledge of said agreement at the time of their respective purchases, and *Jeremiah J. Mogg* was informed thereof immediately after the purchase, and each of said defendants accepted the same in good faith as binding and regarded it as enhancing the value of such property. Since purchasing, defendants have severally improved the premises at large expense by the erection of summer residences. On October 26, 1903, plaintiff *Uihlein* purchased through mesne conveyances from Johnston all that remained of Forest Glen property, which he thereupon subdivided into lots and caused a plat thereof to be recorded. Said purchase and platting were subsequent to the purchase and improvements made by defendants. Upon lot 1 in said subdivision plaintiff *Uihlein* and the other plaintiffs have laid out golf links, and upon lot 3 they are proposing to erect a clubhouse, locker house, and pier or boat landing, all to be used for club purposes. Title to both of said lots 1 and 3 is in *Uihlein* individually. Other lots in *Uihlein* subdivision have been conveyed to plaintiffs *Sarah W. Boyden, Edgar G. Stearns, John H. Dawson,* and *Herbert G. Brinsley,* and none of them had his attention called to said agreement. In deed to *Uihlein* of Johnston, Jr., tract no reference was made to the agreement, nor in the deeds from *Uihlein* to his coplaintiffs; and when making said purchases *Uihlein* had forgotten, if he had ever known, that said agreement in terms included the land so purchased. It is the intention of plaintiffs to erect and maintain the proposed clubhouse on lot 3 as a neighborhood and social clubhouse, to be used in connection with the golf grounds and for other social purposes. It is not intended to limit the membership of the proposed club for whose use the clubhouse is to be erected. The pier proposed to be erected in front of lot 3 is to be for the accommodation of members, their families and guests. It is expected that during the summer season both public and private boats will call frequently at the proposed pier for the purpose of re-

ceiving and discharging passengers; that said clubhouse and grounds will be in use for playing golf and other social diversions on all days of the week, including Sundays; that boats calling at said landing will announce their approach by whistle; that private boats bringing members or guests will frequently tie up at said landing while the passengers are engaged in play; and that such coming and going and lying to of steamboats will cause more or less noise, disturbance, and the emission of smoke in the vicinity; and that such proposed use of the premises, or other use thereof for club purposes, is objectionable to defendants and is regarded by them as distracting and interfering with the privacy of their homes and the quiet, seclusion, and rest which they sought in purchasing and building the same.

The conclusions of law by the trial court were in substance as follows: The Johnston-Weiss agreement did create a valid and binding restriction upon the use thereafter of all said premises known as Forest Glen. Said restriction created by said agreement constituted and became a covenant running with the land and binding upon the parties thereto. The record of said agreement was notice thereof, and of said restriction therein contained, to all subsequent purchasers of said Forest Glen tract and binding upon them. The proposed use of lot 3 in said *Uihlein* subdivision for club purposes is within the terms of said restriction, and if carried into effect would constitute a violation thereof. The plaintiffs severally purchased their respective holdings of land with notice of, and hence subject to, said restriction. Defendants, as grantees or assigns of said Johnston, Jr., are entitled to the benefits of said restriction. Defendants are entitled to judgment dismissing the complaint and enjoining the plaintiffs from erecting, maintaining, or operating the proposed clubhouse or any hotel or other building or institution prohibited by said agreement.

Judgment was entered dismissing the complaint, and re-

straining plaintiffs as prayed in the counterclaim, from which plaintiffs appealed to this court, and assign the following errors: (1) In adjudging that the defendants are entitled to the benefit of the restrictions in the Johnston-Weiss agreement and have the right to enforce them against plaintiffs. (2) In finding that express reference to the Johnston-Weiss agreement in the conveyance from Weiss to *Uihlein* of the Weiss tract rendered the restriction therein contained binding upon *Uihlein* in his subsequent purchase of a part of the Johnston tract. (3) In finding that the Johnston-Weiss agreement was an instrument entitled to record within the recording acts; and that the record thereof rendered the contents of such agreement notice to subsequent purchasers and binding upon them. (4) In construing the Johnston-Weiss agreement to include within its restrictions the neighborhood or social clubhouse planned by plaintiffs.

Jay F. Lyon, for the appellants, contended, *inter alia,* that, in order to enable subsequent grantees from a common grantor to enforce a restriction *inter sese,* such restriction must have entered into and formed a part of the conveyance to them from such grantor; and that it is not sufficient that the land in the hands of the common grantor is subject to a restriction imposed thereon in pursuance of a general plan or scheme. *De Gray v. Monmouth Beach C. H. Co.* 50 N. J. Eq. 329, 335, 24 Atl. 388; *Trout v. Lucas,* 54 N. J. Eq. 361, 35 Atl. 153; *Clark v. McGee,* 159 Ill. 518, 42 N. E. 965; *Sharp v. Ropes,* 110 Mass. 381; *Beals v. Case,* 138 Mass. 138; *Hemsley v. Marlborough H. Co.* 62 N. J. Eq. 164, 50 Atl. 14; *Jeffries v. Jeffries,* 117 Mass. 188 (second case); *Parker v. Nightingale,* 6 Allen, 341; *Mulligan v. Jordan,* 50 N. J. Eq. 363, 24 Atl. 543; *Jewell v. Lee,* 14 Allen, 145; *Keates v. Lyon,* L. R. 4 Ch. App. 218; *Graham v. Hite,* 93 Ky. 474, 20 S. W. 206; *Haines v. Finwachter* (N. J. Eq.) 55 Atl. 38; *Summers v. Beeler,* 90 Md. 474, 78 Am. St. Rep. 446; *King v. Dickeson,* L. R. 40 Ch. Div. 596, 58 L. J. Ch. 464, 60 L. T. 785, 37

W. R. 553; *Lewis v. Ely,* 100 App. Div. 252, 92 N. Y. Supp. 705.

For the respondents there was a brief by *Franklin J. Tyrrell* and *Simmons, Nelson & Walker,* and oral argument by *John B. Simmons.*

The following opinion was filed March 19, 1907:

KERWIN, J. The important question presented for consideration under the assignments of error is the effect which should be given to the Johnston-Weiss agreement set out in the statement of facts as regards the property described therein. The deed to Weiss and the Johnston-Weiss contract were executed contemporaneously as parts of one transaction, and hence upon familiar principles must be read together as one instrument. *Blakeslee v. Rossman,* 43 Wis. 116; *Gillmann v. Henry,* 53 Wis. 465, 10 N. W. 692; *Stapleton v. Brannan,* 102 Wis. 26, 78 N. W. 181; *Security T. & L. Ins. Co. v. Ellsworth,* 129 Wis. 349, 109 N. W. 125. Both instruments were executed in pursuance of a general scheme, as set forth in the agreement, for the purpose of preserving the character of the Forest Glen property as first-class residence property "by the present owners and future purchasers of the same." The agreement expressly prohibiting the use of the property for other purposes named therein clearly refers to all property described, as well that retained by Johnston as that conveyed to Weiss. The deed and agreement were recorded in the office of the register of deeds of the proper county. It seems manifest from the express terms of the agreement, to the effect that it should be binding on all purchasers of any portion of the property and upon the heirs, executors, administrators, and assigns of each party, and that the covenant should run with the land, that the parties intended to impress the property with an equitable servitude in the nature of a restriction. This restriction obviously was re-

garded of value to the whole property and inserted for the benefit of those who might become owners of separate parcels and for their mutual protection. No reason is perceived why such a restriction should not be as binding in equity upon any grantee of a portion of the premises with notice as if inserted in a deed to him. Clearly the restriction was impressed upon all the property, and upon the transfer of any portion it passed to the grantee burdened with the restriction. It is apparent from the established facts that the agreement was executed in pursuance of a general scheme for the benefit and improvement of the property and not for the benefit of the grantor alone, and that each purchaser with notice took the portion conveyed with the right to enforce the restriction against other grantees of portions of the property charged with the restriction. 2 Pom. Eq. Jur. (3d ed.) § 689; 4 id. § 1342; 3 id. § 1295. The very object of the restriction was to enhance the value of the property by making it desirable for residence property, and such enhanced value was obviously intended to be secured by imposing upon all the property a servitude in the nature of a restriction which could be enforced by the grantees *inter sese.*

It is insisted, however, by appellants that the restriction cannot be enforced because not inserted in the deeds to either defendants or plaintiffs; that there was no agreement that the restriction should be inserted in the deed from Johnston of the Johnston tract; that there is no evidence that subsequent purchasers of the Johnston tract should have the benefit of the covenant against each other; and that there is no evidence that the covenant was part of the subject matter of the purchase by any defendant. The agreement itself meets all these objections. It was designed by its terms to be a general plan or scheme for the enhancement of the value of the property by the protection of all purchasers of any portion of the property from the use of any other portion otherwise than for

first-class residence property. It was by the terms of the agreement made a covenant running with the land, for the manifest purpose of securing its observance by the owner of any portion as against the owner of any other portion. This right by each grantee was a valuable right, and was therefore a part of the subject matter of the purchase. So the covenant in the form of a restriction being appurtenant to the land and every parcel of it, the right to enforce it at least in equity by any grantee against any other grantee passed with the land. The whole tract of land being by the Johnston-Weiss agreement impressed with an equitable servitude for the benefit of all purchasers under the scheme that the property should be preserved for first-class residence property, and other uses named prohibited, each grantee is entitled to enforce such restriction in equity. 2 Pom. Eq. Jur. (3d ed.) § 689; 1 Jones, Real Prop. in Conv. § 780. Where the general plan or scheme of an agreement restricts property to a certain use and prohibits other uses, it is immaterial whether the covenant runs with the land or not, where the agreement is made for the mutual benefit of all the land though held by different owners. In such case equity will enforce such servitude as between the several grantees of parts of the premises with notice. 1 Jones, Real Prop. in Conv. §§ 780, 781, 782; *Austerberry v. Oldham,* L. R. 29 Ch. Div. 750; *Jeffries v. Jeffries,* 117 Mass. 184, 188; *De Gray v. Monmouth Beach C. H. Co.* 50 N. J. Eq. 329, 24 Atl. 388; *Coles v. Sims,* 5 De Gex, M. & G. 1; *Nottingham P., B. & T. Co. v. Butler,* L. R. 15 Q. B. Div. 261; *Winfield v. Henning,* 21 N. J. Eq. 188. Most of the cases cited by counsel for appellants turn upon the fact that the restrictive covenant was for the benefit of the grantor alone, hence was not enforceable between grantees. But in these cases the right to enforce a restrictive covenant appurtenant to the property between grantees is recognized: *Badger v. Boardman,* 16 Gray, 559; *Sharp v. Ropes,* 110 Mass. 381; *Haines v. Einwachter* (N. J. Eq.) 55 Atl. 38;

Hemsley v. Marlborough H. Co. 62 N. J. Eq. 164, 50 Atl. 14. In *Badger v. Boardman,* 16 Gray, 559, 560, the court said:

"If it appeared that the parties to that conveyance intended to create or reserve a right in the nature of a servitude or easement in the estate granted, which should be attached to and be deemed an appurtenance of the whole of the remaining parcel belonging to the grantor, of which the plaintiff's land forms a part, then it is clear, on the principles declared in the recent decision of *Whitney v. Union R. Co.* 11 Gray, 359, that the plaintiff would be entitled to insist on its enjoyment, and to enforce his rights by a remedy in equity."

The controlling question in all cases seems to be whether the grantor intended to create an equitable servitude which should be appurtenant to the estate or intended for the mutual benefit of the respective grantees of portions of the estate for whose benefit the covenant was made. *Beals v. Case,* 138 Mass. 138; *Tobey v. Moore,* 130 Mass. 448; *Hano v. Bigelow,* 155 Mass. 341, 29 N. E. 628; *Badger v. Boardman,* 16 Gray, 559; *Summers v. Beeler,* 90 Md. 474, 45 Atl. 19; *Hopkins v. Smith,* 162 Mass. 444, 38 N. E. 1122; *Clark v. McGee,* 159 Ill. 518, 42 N. E. 965. Whenever it fairly appears from the words of the grant that it was the intention of the parties to preserve a right in the nature of an equitable servitude in the property granted for the benefit of other land owned by the grantor and embraced within the same tract as the parcel granted, such servitude becomes appurtenant to the land of the grantor, and the burden thus created will pass to and be binding upon subsequent grantees of different portions of such tract. *Whitney v. Union R. Co.* 11 Gray, 359; *Parker v. Nightingale,* 6 Allen, 341; *Linzee v. Mixer,* 101 Mass. 512; *Peck v. Conway,* 119 Mass. 546; *Clark v. Martin,* 49 Pa. St. 289; *Watrous v. Allen,* 57 Mich. 362; *St. Andrew's L. Ch. Appeal,* 67 Pa. St. 512; *Mann v. Stephens,* 15 Sim. 377. The question is one resting upon the intention of the grantor respecting the restriction or servitude, and whether the restriction in the conveyance should apply to the portion con-

veyed only, or to the other lands of the grantor included in a general scheme for the benefit of all the lands of the grantor embraced within such scheme, and the form of the instrument used to create such restriction or servitude is not material. Words of covenant are as effectual as words of grant. *Hogan v. Barry,* 143 Mass. 538, 10 N. E. 253; *Ladd v. Boston,* 151 Mass. 585, 24 N. E. 858; Jones, Easements, § 113; *Tallmadge v. East River Bank,* 26 N. Y. 105; *Curtiss v. Ayrault,* 47 N. Y. 73; *Schwoerer v. Boylston M. Asso.* 99 Mass. 285; *Gilmer v. Mobile & M. R. Co.* 79 Ala. 569, 58 Am. Rep. 623; *Trustees v. Lynch,* 70 N. Y. 440; *Wetmore v. Bruce,* 118 N. Y. 319, 23 N. E. 303; *Atlantic City v. New A. P. Co.* 67 N. J. Eq. 284, 58 Atl. 729; *Horn v. Miller,* 136 Pa. St. 640, 20 Atl. 706. In *Greene v. Creighton,* 7 R. I. 1, tenants in common by deed dedicated a strip of land to be used as a highway, upon which their lots, on both sides of it, were to front, inserting in such deed a covenant "for themselves, their heirs and assigns, respectively," that no building should be erected within eight feet of the street line. This covenant was held "a grant, in fee, to each, of a negative easement in the land of all, and as such capable, upon the disturbance of the easement, of being enforced by the appropriate remedies at law and in equity." It is considered that the Johnston-Weiss agreement was sufficient to impress all of the Forest Glen property, as well that portion retained by Johnston as that conveyed to Weiss, with a servitude in the nature of a restriction which passed as appurtenant to the property. 1 Jones, Real Prop. in Conv. § 784; Jones, Easements, § 110; *Peabody H. Co. v. Willson,* 82 Md. 186, 32 Atl. 386; *Burbank v. Pillsbury,* 48 N. H. 475; *Amerman v. Deane,* 132 N. Y. 355, 30 N. E. 741. Some point is made by counsel for appellants to the effect that the restriction in question did not enter into the consideration for the purchase by defendants of their respective parcels. Upon the facts established by the findings it cannot be said that the

restriction was not an inducement to purchase. On the contrary it is quite obvious that it materially affected the value of the property for first-class residence purposes. The defendants all had notice of this restriction, and it cannot be said that it did not furnish an inducement, or enter into the consideration of the purchase. *Hills v. Miller,* 3 Paige Ch. 254; *Tallmadge v. East River Bank,* 26 N. Y. 105. The restriction being intended to apply to all of the property included in the Forest Glen tract, no covenant was necessary in the deeds from either Weiss or Johnston in order to enable the respective grantees with notice of the terms of the agreement to enforce the restriction *inter sese.* Jones, Easements, §§ 110, 113; *Whatman v. Gibson,* 9 Sim. 196; *St. Andrew's Luth. Ch. Appeal,* 67 Pa. St. 512; *Watrous v. Allen,* 57 Mich. 362, 24 N. W. 104; *Curtiss v. Ayrault,* 47 N. Y. 73; *Rowland v. Miller,* 139 N. Y. 93, 34 N. E. 765; *Ladd v. Boston,* 151 Mass. 585, 24 N. E. 858; *Greene v. Creighton,* 7 R. I. 1; *Gilmer v. Mobile & M. R. Co.* 79 Ala. 569, 58 Am. Rep. 623; *Wetmore v. Bruce,* 118 N. Y. 319, 23 N. E. 303; *Barrow v. Richard,* 8 Paige Ch. 351; 1 Jones, Real Prop. in Conv. §§ 784, 791, 792; *Burbank v. Pillsbury,* 48 N. H. 475.

Under the second and third assignments of error the question of notice is discussed. It is not claimed by appellants that record of the agreement would not constitute constructive notice if it were entitled to record, but it is insisted that it was not entitled to record within the recording acts. It is argued that the agreement does not create an "estate or interest" in land. But the statute goes further than merely providing that only an instrument which creates an "estate or interest" in land shall be entitled to record. It provides that "every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity," is a "conveyance" within the meaning of the recording act. Even if it be conceded that the restriction in the agreement

does not create "an estate or interest in real estate" within the meaning of sec. 2242, Stats. (1898), it seems clear under the authorities that the instrument is one by which the title to the real estate therein described is "affected in law or equity." We think the authorities heretofore cited are ample upon this point, but in addition thereto we call attention to the following: *Parker v. Nightingale,* 6 Allen, 341; *Crawford v. Witherbee,* 77 Wis. 419, 46 N. W. 545; *Linzee v. Mixer,* 101 Mass. 512; *Scudder v. Watt,* 98 App. Div. 228, 90 N. Y. Supp. 605; *Uihlein v. Matthews,* 172 N. Y. 154, 64 N. E. 792; *Halle v. Newbold,* 69 Md. 265, 14 Atl. 662. It is argued by respondents that the plaintiff *Uihlein* had actual notice, but we do not deem it necessary to consider this question, since we hold that the agreement between Johnston and Weiss was entitled to record, and, having been duly recorded, was constructive notice.

It is further contended that the erection of the proposed clubhouse, and boat landing to be used in connection therewith, does not constitute a violation of the restriction imposed upon the Forest Glen property under the Johnston-Weiss agreement. The restriction is against the sale or use of any portion of the Forest Glen property "for hotel, club, or camping purposes, or for any reformatory, charitable, or penal institution." It is quite clear from the language of the restriction as well as from the provisions in other parts of the agreement that it was intended by the parties to the agreement that the use of the property by all clubs should be restricted. Obviously the word "club" in this agreement was used in its most comprehensive sense, and intended to embrace just such a clubhouse as the plaintiffs propose to construct. The term "club" is defined by Webster as "An association of persons for the promotion of some common object, as literature, science, politics, good fellowship, etc." The clubhouse here intended to be constructed, as appears by the established facts, to be used in connection with a pier, or landing place

for steamboats, and the noise, smoke, and inconvenience necessarily attendant upon the use of such landing place by steamboats, and the use of such clubhouse and golf grounds in connection therewith, would be not only a violation of the letter but of the spirit of the agreement. It cannot be doubted upon the established facts, as well as upon the face of the agreement itself, that the purpose of the parties was to preserve the character of the property as first-class residence property and to exclude such clubs and clubhouses therefrom as the plaintiffs propose to establish. But it is not necessary to go outside of the express terms of the agreement itself, because upon its face it clearly and in unequivocal terms prohibits the use of the property for hotel, club, or camping purposes, so that the restriction includes clubs of all kinds.

The case presents many interesting questions, all of which have received careful consideration by the court, and for the reasons given in the foregoing opinion it is considered by the court that the judgment below should be affirmed.

By the Court.—The judgment of the court below is affirmed.

The following opinion was filed April 30, 1907:

WINSLOW, J. (*dissenting*). I think the judgment in this case should be reversed, and will briefly state my reasons for my conclusion: John Johnston, Jr., originally owned the entire property, and in October, 1892, sold 13.40 acres thereof to Weiss, and at the same time Johnston and Weiss made a written agreement that the character of the whole property as first-class residence property should be preserved by them and by future purchasers and that no part thereof should be at any time occupied, used, or sold by them or by their heirs, personal representatives, or assigns for club purposes. This agreement was duly recorded and was entitled to record, and could doubtless be enforced by either party or his privies by

appropriate action against the other party or his privies. This, however, is not such an action. The parties here, both plaintiffs and defendants, are subsequent purchasers of parcels of the part reserved by Johnston, and they all claim under mesne conveyances from Johnston which contain no restrictions on the use. None of them are purchasers under Weiss or are in privity with Weiss, hence it is clear that they have succeeded to none of Weiss's rights under his contract with Johnston. The right of one purchaser from Johnston to compel a restricted use of a part of the property by another purchaser must therefore depend, not upon contract or covenant, but upon the application of some equity arising out of the facts surrounding their purchases. There is a well-established equitable principle that when the owner of a tract of land adopts and makes public a general scheme for the improvement of the tract and divides it into lots or parcels, and conveys the lots with uniform restrictions on their use, these restrictions are held to be for the benefit of all the purchasers, and may be enforced by one purchaser against another. 1 Jones, Real Prop. in Conv. § 771. In such cases the question whether the restriction creates a right which inures to the benefit of all purchasers is a question of the intention of the grantor, to be gathered from the terms of the various grants or from the surrounding circumstances, or both; and, where the intention is to be gathered from circumstances only, the circumstances relied on must be such as to show such intention by necessary and unavoidable implication. In the present case there is absolutely no evidence to show that Mr. Johnston had any intention to subdivide his reserved land when he made the contract with Weiss. The contract itself contains nothing more than would ordinarily be inserted in such an agreement between two adjoining owners of lands who had no intention to subdivide or improve, but simply intended each to bind himself and his grantees to certain restrictions in favor of the other party and his grantees. Not only this, but

it further appears that when some years later Mr. Johnston began to subdivide his own property, he inserted no clause in any of the deeds restricting the use of the property, nor was there a word said concerning such a restriction between Johnston and his grantees. If he had any such intention when he dealt with Weiss there is absolutely nothing to show that he had any such intention when, at a later period, he subdivided his remaining land. On the contrary, the implication seems to me clear that he had no such intention from the total failure to mention the subject in any way in his deeds to the plaintiffs and defendants. The plaintiffs are here with absolutely no contract rights against the defendants, and they have utterly failed to show that, when their common grantor subdivided and deeded his land, he had any intention to impose general restrictions on its use, and much less that he made any such intention public by word or act.

The law does not favor perpetual restrictions upon the alienation or lawful use of lands, and in my judgment no case was made here calling upon a court of equity to create restrictions.

DODGE, J. I concur in the foregoing dissenting opinion of Mr. Justice WINSLOW.

A motion for a rehearing was denied May 21, 1907.

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3. A general exception to the whole of a charge which embraces several distinct propositions is not available on appeal. *Ibid.*

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4. In a garnishee action in aid of an execution issued on a justice's judgment in a replevin action, plaintiff had judgment in justice's court and defendants appealed. In the circuit court, on defendants' motion, the garnishee action was dismissed for want of jurisdiction. On appeal from the judgment of dismissal a bill of exceptions was settled purporting to show all that occurred on such dismissal, but it did not contain any of the proceedings in the replevin action or execution: *Held,* that such proceedings are not a part of the record in the garnishee action and are not before this court on the appeal from the judgment of dismissal. *Kuehn v. Neroz,* 610

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5. In such case no jurisdictional defects being claimed to exist except in the replevin proceedings and execution, the judgment of dismissal must be reversed. *Ibid.*

6. On appeal, in testing the sufficiency of a record to support a judgment, as a rule, the presumptions are against error, and such only are to be considered as appear with reasonable clearness. *Bautz v. Adams,* 152

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8. The decision of the trial court denying a new trial will not be disturbed on appeal unless it clearly appears that the verdict is not supported by the evidence. *Kirkland v. State,* 61

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10. Where, on appeal from a justice, a case is determined in circuit court upon the return without a new trial, the conclusions of fact of the circuit court will not be disturbed unless they are contrary to the clear preponderance of the evidence. *Brunkow v. Waters,* 31

11. Where a jury has returned a general verdict upon controverted facts relative to an oral contract, for the purpose of assigning and considering errors it must be taken that the facts are those in evidence which are most favorable to sustain the verdict of the jury. *Oliver v. Katz,* 409

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13. The exclusion of evidence offered to prove undisputed facts is not a prejudicial error. *Anderson v. Arpin H. L. Co.* 34

14. An alleged excess of $1.54 in a verdict awarding $134.03 for services, commissions, etc., might well be referred to the rule *de minimis non curat lex. McKone v. Metropolitan L. Ins. Co.* 243

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17. The decision of a question on appeal is conclusive of the same matter when again presented in the same case upon the same or substantially the same evidence. *Horn v. La Crosse Box Co.* 384

18. A decision on a former appeal that plaintiff, against whom a verdict had been directed on the ground that the evidence showed his contributory negligence as matter of law, was entitled to have that question submitted to the jury, is *held* to be conclusive of defendant's right to have that question so submitted on a second trial upon substantially the same evidence. *Ibid.*

19. Questions once considered and determined by this court will not be reconsidered when they arise again in the same case, where there is nothing new or different in the record which should operate to change such determination, and nothing is suggested showing that it was erroneous. *Murphy v. State,* 420

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20. If a fact, essential to a judgment rendered in an equity case, does not appear to have been found by the trial court, but it appears from the record with reasonable certainty to exist, it may be

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21. Where there was a failure of proof as to some fact essential to a recovery and there is no reasonable probability that the lacking proof would be supplied on another trial, the supreme court will direct the judgment to be entered below without remanding the case for a further hearing. *Brillion L. Co. v. Barnard*, 284

22. On reversing the judgment of the trial court, if it appear that the case was fully tried and that there is no possibility of a material change, upon a new trial, in the facts proven, the supreme court will direct the entry of judgment. *Dahlman v. Milwaukee*, 427

23. When a case is ready for final disposition after full trial, the supreme court will not remit it with leave to make application to the trial court to set up a new cause of action or new defense, unless there is, at least, a fairly persuasive showing on the merits and it is also made to appear that the failure to present the new cause of action or defense in the first instance was not due to mere negligence. *Ibid.*

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24. When the record upon an appeal to the supreme court has been regularly transmitted to and filed with the court from which it originally came, the jurisdiction of the supreme court over the cause, as also to vacate or modify its own judgment, is at an end. *Ott v. Boring*, 472

25. Under sec. 3071, Stats. (1898), it is the duty of the clerk of the supreme court to remit the papers in a case to the trial court within sixty days after the decision of the appeal, unless the court directs them to be retained to enable a party to move for a rehearing; and at the expiration of the sixty days if no such direction has been given, or whenever, without disobedience of any rule or order of the court, the clerk actually transmits the papers within the sixty days and they are filed in the court below, the jurisdiction of the supreme court is terminated. *Ibid.*

26. The termination of the jurisdiction of the supreme court when the record has been transmitted as stated does not affect its power to correct the mere record of its judgment so as to make the record properly express such judgment. *Ibid.*

27. Under Supreme Court Rule 42 all motions in the nature of a motion for a rehearing (as one to modify the judgment or mandate) are, like motions strictly for a rehearing, to be made within the thirty days during which, by Rule 37, in all cases the papers are directed to be retained. *Ibid.*

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Same: Note of husband and wife.

2. A note executed by husband and wife as collateral to a prior note of the husband, in consideration of a definite extension of the time for payment of such prior note, is valid as against the husband. *Goll v. Fehr,* 141

Same: Notes given for patents, stallions, lightning rods, etc.

3. Ch. 438, Laws of 1903, though void so far as it relates to patents and patent rights, is valid so far as it relates to notes or other evidences of indebtedness given for stallions. *J. H. Clark Co. v. Rice,* 127 Wis. 451, limited. *Quiggle v. Herman,* 379

4. A note given for a stallion, but not having on its face the words required by ch. 438, Laws of 1903, is void. [Whether, as to an innocent purchaser before due, the maker of such a note would be estopped to set up its illegality, not determined.] *Ibid.*

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5. A note taken for lightning rods, but not having on its face the statement of such consideration required by ch. 438, Laws of 1903, is valid and enforceable in the hands of an innocent holder for value. *Arnd v. Sjoblom,* 642

Bona fide holder: Notice of infirmity.

6. In an action upon a note alleged to have been transferred to plaintiff for value before due, an answer alleging that the giving of the note was induced by certain false and fraudulent representations, by reason of which defendants were damaged in a certain sum, and that when plaintiff purchased the note he knew the fact that the representations were made and that they were false when made, is *held* sufficiently to charge that plaintiff had notice of the infirmity in the instrument when he purchased it and hence was not a holder in due course. *Quiggle v. Herman,* 379

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2. In an action by brokers to recover a commission on sale of land, upon the evidence it is *held* that the terms of the original contract and whether there was thereafter a limitation upon the time for procuring a buyer were questions for the jury. *Oliver v. Katz,* 409

3. Upon the evidence it is *held* that the jury were justified in finding that the brokers did procure a purchaser upon terms satisfactory to the owner and within a reasonable time. *Ibid.*

4. Where the owner of land agrees to pay a commission to a broker for procuring a buyer, and a buyer is procured by the broker but refuses to pay the price asked by the owner, if the owner afterwards, during the continuance of the broker's agency, sells to the person so procured at a lower figure he is nevertheless liable for the commission. *Ibid.*

5. If no time is limited for procuring a buyer the broker is entitled to a reasonable time, and what is a reasonable time, under all the circumstances, is a question for the jury. *Ibid.*

6. The fact that the buyer consulted another person besides the brokers in the matter and had resolved not to buy unless that person approved of the purchase is immaterial upon the question whether the brokers' efforts were the procuring cause of the sale. *Ibid.*

7. Traveling expenses of brokers in connection with a sale of land and compensation paid by them to a subagent are *held* to have been covered and compensated by their agreed commission of a specific amount on the sale. *Lyttle v. Goldberg,* 613

BUILDING CONTRACTS. See LIENS, 3–7.

BURDEN OF PROOF. See ANIMALS, 1, 2. CRIMINAL LAW, 13. NEGLIGENCE. SCHOOLS, 1. TAX TITLES, 5, 15. TRIAL, 12–14. VENDOR AND PURCHASER, 1.

CARRIERS. See RAILROADS, 4–7.

CERTIORARI.

Jurisdictional defects not set forth in the petition for a writ of *certiorari* will not be considered on such writ. *State ex rel. Haeselich v. Schweitzer,* 138.

CHAMPERTY AND MAINTENANCE.

Undisputed evidence of plaintiff's complete poverty does not necessarily establish a champertous agreement on the part of her attorneys to assume the burden of the litigation. *Lyttle v. Goldberg,* 613.

CHANGE OF VENUE. See VENUE.

CIRCUIT COURTS. See COURTS.

CITIES. See INTOXICATING LIQUORS. MUNICIPAL CORPORATIONS.

CLERKS OF COURTS. See APPEAL, 25. GRAND JURY, 1–3.

CO-EMPLOYEES. See MASTER AND SERVANT, 20–24. RAILROADS, 10.

COLLATERAL ATTACK. See MANDAMUS, 2.

COLLATERAL SECURITY. See BILLS AND NOTES, 2.

COMMISSIONS. See BROKERS.

COMMON SCHOOLS. See MANDAMUS. SCHOOLS.

CONDEMNATION OF LAND. See RAILROADS, 1–3.

CONDITIONS PRECEDENT. See EJECTMENT, 2, 3. MASTER AND SERVANT, 6–8. MUNICIPAL CORPORATIONS, 1, 3. TAX TITLES, 12. VENDOR AND PURCHASER, 4. VENUE, 1–3.

CONSIDERATION. See BILLS AND NOTES, 2–5. CONTRACTS, 2. COUNTIES, 1. HUSBAND AND WIFE, 2. WILLS, 1.

CONSTITUTIONAL LAW.

Construction of constitutional provisions.

1. Obscurities in constitutional provisions are discoverable by the same process as are uncertainties in legislative enactments, and are to be dealt with in substantially the same way in determining the real intent of the lawmakers. *State ex rel. Williams v. Samuelson,* 499.
2. Where language used in a constitution may reasonably have more than one meaning, long, constant, and uniform legislative adoption of one of such meanings, not in violation of any existing judicial construction, may be taken as controlling. *Ibid.*

Legislation in conflict with federal constitution or statutes. See BILLS AND NOTES, 3.

Guaranties to persons charged with crime. See CRIMINAL LAW, 8.

Elections: County officers: Creation of new offices.

3. The county supervisor of assessment whose election by the county board for a term of three years is provided for by

ch. 445, Laws of 1901, is not a county officer within the meaning of sec. 4, art. VI, Const., providing that "sheriffs, coroners, . . . and all other county officers except judicial officers shall be chosen by the electors of the respective counties once in every two years." *State ex rel. Williams v. Samuelson,* 499

4. The term "all other county officers," incorporated into sec. 4, art. VI, Const., by amendment in 1882, means the heads of the several major divisions of county government existing at that time, and the section as amended does not take away the legislative power mentioned in sec. 9, art. XIII, to create other county offices with other duties and to provide for the manner of filling such offices and the terms thereof. *Ibid.*

Offices created by legislature: Prescribing qualifications, etc.

5. As to offices created by the legislature and having peculiar duties incident thereto, the legislature may prescribe qualifications if they are reasonable and not opposed to constitutional provisions or the spirit of the constitution. *Ibid.*

6. A requirement that, in order to be eligible to the office of county supervisor of assessment, a person must have been an elector and householder of the county not less than four years, is not unreasonable. *Ibid.*

7. The legislature may provide, in respect to an office created by it, that the official bond of the officer shall be by a surety company and at public expense. *Ibid.*

Same: Interference with local self-government: Assessment for taxation.

8. Ch. 445, Laws of 1901, which gives to a county supervisor of assessment supervision and direction of the work of the assessors in his county, but does not take out of the hands of an assessor the duties of his office or take away his right to exercise his discretion in valuing property, does not violate the right of local self-government. The whole duty of the supervisor, under said act, has reference to assisting the assessors, testing their work, seeing that the law is not violated, and in case of violations applying the proper remedy. *Ibid.*

[9. Whether ch. 259, Laws of 1905, imposing new duties on the supervisor of assessment, violates the right of local self-government, not decided.] *Ibid.*

Legislative appointment to or continuance in office. See COUNTY JUDGE, 3. OFFICERS.

Vested rights. See MUNICIPAL CORPORATIONS, 3.

Taking property for public use. See MUNICIPAL CORPORATIONS, 4.

Due process of law. See GUARDIAN AND WARD, 2.

10. When the loss of property which a party supposed he owned results from the judgment of a court having full jurisdiction to the effect that he has no title, he is not deprived of property without due process of law. *Cole v. Van Ostrand,* 454

Same: Obligation of contract.

11. Where, before a statute of limitation has completely run so as to vest title by excluding the possibility of attack thereon, the period of limitation is extended, such extension does not impair the obligation of contract or deprive any one of property without due process of law. *Ibid.*

CONTINUANCE.

See VENUE, 4.

Refusal to continue a cause over the term because of the alleged sudden illness of defendant, and refusal thereafter to grant a new trial on the same ground, are *held*, upon the showing made by affidavits upon both sides, not to have been an abuse of discretion. *Schamper v. Ullrich*, 524

CONTRACTS.

Proposal and acceptance. See MASTER AND SERVANT, 1.

Agency of principal contractor to make subcontracts. See LIENS, 3.

Ratification. See WILLS, 2.

Validity: Contravention of statute.

1. Before pronouncing invalid a contract which is claimed to contravene a statute, a court should consider whether the statute expressly prohibits the contract, penalizing the act of making it and punishing all concerned, or, without express prohibition, merely imposes a penalty upon one of the parties; the nature of the sanction, whether fine or imprisonment or civil forfeiture; whether the act in question is *malum in se* or merely *malum prohibitum;* whether it comes within the prohibitive words of the statute generally or only upon condition that certain formalities of evidence are omitted; the subject matter of the legislation and the effect upon innocent third persons of holding the contract void; whether to hold it void would not rather encourage than discourage violations of the statute; and what class of persons or interests the statute is intended to protect, and whether that protection would be defeated by holding the contract void. *Laun v. Pacific Mut. L. Ins. Co.* 555

Same: Rebate of premium. See INSURANCE, 1, 2.

Same: Oral agreements. See FRAUDS, STATUTE OF.

Same: Married women. See HUSBAND AND WIFE.

Same: Indefiniteness and uncertainty. See WILLS, 3.

Consideration: Sufficiency, etc. See COUNTIES, 1. HUSBAND AND WIFE, 2. WILLS, 1.

2. Promises by a district superintendent to make good to the insurance company certain losses sustained by it through defalcations of an agent for which the superintendent supposed himself legally responsible, when in fact he was in no way responsible therefor, were without consideration and void, where they were not made by way of compromise or adjustment of any claim of liability; and the fact that at the request of the superintendent, made in connection with such promises, the company paid its own debts or performed its own obligations to third persons, did not constitute a sufficient consideration for the promises. *McKone v. Metropolitan L. Ins. Co.* 243

Public policy: Restraint of trade.

3. A contract in general restraint of trade is void as being against public policy; but a particular restraint of trade within reasonable limits, having regard to the interests of the party contracted with, is valid. *Kradwell v. Thiesen*, 97

4. An agreement by the vendor of shares of stock in a drug company that he would not either directly or indirectly, in his own

name or as stockholder or as agent, engage in the business of selling drugs either at wholesale or retail, or conduct a drug store, in the same city for a period of five years, did not impose a restraint larger than was reasonable for the protection of the purchasers, and was valid. *Ibid.*

5. The fact that the sale of the stock did not transfer any title to the good will of the business—that being the property of the corporation itself—did not render the agreement invalid. *Ibid.*

6. Upon a showing that the vendor in such case had, within the time limited, entered the employ of another drug company in the same city and had assisted in the management of the business of said company, the granting of a preliminary injunction restraining him from doing any of the things which he had agreed not to do was not an abuse of discretion. *Ibid.*

Same: County officers.

7. A contract whereby the manager of a corporation, who was also chairman of the county board, knowing that an action to have certain county orders declared void was threatened, agreed on behalf of the corporation to purchase and pay for said orders and take chances on the litigation, was *contra bonos mores* and void. *Giblin v. North Wis. L. Co.* 261

Construction and operation. See MASTER AND SERVANT, 2–8. PRINCIPAL AND AGENT, 2. PRINCIPAL AND SURETY, 3, 4. SALES. TRIAL, 5. VENDOR AND PURCHASER, 1–7.

Same: Right to withdraw from contract.

8. Under the terms of a contract for the sale of a large amount of property, rights, concessions, etc., it is *held* that while the contract remained executory the vendors had the right, upon returning or offering to return the sum paid, to withdraw from the contract and declare it void. *Pierce v. Signor,* 621

Rescission.

9. Upon being solicited by plaintiffs' agent, defendant declined to make a contract for the attendance of his daughter at plaintiffs' business college unless some of her former classmates in school should attend the college at the same time, and was thereupon induced to make such a contract by false representations of the agent that he had secured similar contracts from the parents of several of the daughter's classmates, naming three of them specifically. *Held,* that such representations were relevant and material to the negotiations and constituted a fraud which warranted defendant in rescinding the contract. *Brown v. Search,* 109

10. Defendant's refusal to send his daughter to the college or to make any payment after learning of such fraud was in effect a repudiation of the contract and, the contract being wholly executory and plaintiffs not having changed their position or incurred any liability on account of it, defendant was not estopped to set up the fraud as a defense to an action on the contract. *Ibid.*

11. The fact that plaintiffs had paid their agent for his services in securing the contract from defendant did not affect defendant's rights. *Ibid.*

12. A complaint or counterclaim for damages for breach of a contract is in affirmance of the contract and inconsistent with a

claim that the contract has been rescinded, and is a waiver of any right to a rescission. *Main v. Procknow,* 279

13. A contract cannot be rescinded in part and affirmed in part. *Ibid.*

14. Rescission of a contract of sale by the buyer after delivery of the goods consists of a return of the goods within a reasonable time upon sufficient grounds, and refusal to pay the stipulated price therefor. *Ibid.*

15. Where a written contract for the sale of jewelry particularly described the articles and specified the prices in detail, it was not sufficient ground for a rescission by the buyer that, when received, the goods did not come up to expectations, were too high priced, would not sell in that locality, and did not contain certain articles not specified in the contract. *Ibid.*

16. Where plaintiffs had placed money in defendant's hands to pay in part for property to be purchased for them, and defendant, relying thereon, had bound himself to take and pay for the property, plaintiffs could not cancel or rescind their agreement, and defendant had the right to use the money in paying for the property. *Wiger v. Carr,* 584

Actions for breach: Pleading: Evidence. See ACTION. EVIDENCE, 2–5, 11. TRIAL, 7, 11, 12.

17. In an action for breach of contract in failing to return a note to plaintiff at a certain time, the evidence—showing, among other things, that plaintiff had thereafter exhausted the resources of the maker of the note in the collection of later demands against him—is *held* to sustain a finding by the jury that there was no reasonable probability that the maker would have paid the note or any part of it if the bank had returned the note as agreed. *W. H. Kiblinger Co. v. Sauk Bank,* 595

Same: Damages. See DAMAGES, 1.

Impairing obligation of contracts. See CONSTITUTIONAL LAW, 10.

CONTRIBUTORY NEGLIGENCE. See APPEAL, 18. MASTER AND SERVANT, 10, 15, 20–26. NEGLIGENCE. RAILROADS, 4–15. TRIAL, 8.

CONVERSION.
Of personal property. See EXECUTORS.
Of real estate into money. See WILLS, 4.

CONVEYANCES. See COUNTIES, 3. COVENANTS. DEEDS. HUSBAND AND WIFE. MORTGAGES, 1. TAX TITLES. VENDOR AND PURCHASER.

CORPORATIONS.

Married woman as incorporator.

1. Under sec. 1771, Stats. (1898), providing that "three or more adult persons, resident of this state, may form a corporation," etc., a married woman may be an incorporator, even though her husband also is one. *Good Land Co. v. Cole,* 467

Sale of stock: Contract in restraint of trade. See CONTRACTS, 4, 5.

Contracts against public policy. See CONTRACTS, 7.

Purchase and sale of land: Notice of unrecorded conveyance. See VENDOR AND PURCHASER, 9, 10.

Action against corporation: Venue: Demand for change. See VENUE, 2, 3.

Foreign corporation: Doing business in state: Pleading.

2. A complaint showing merely that plaintiff, a foreign corporation, sent a note to defendant bank in this state for collection, with instructions to return it if not paid by a certain date, does not show plaintiff to have been an unlicensed corporation doing business in this state, so as to render the complaint demurrable. *W. H. Kiblinger Co. v. Sauk Bank,* 595

CORROBORATION of witness. See CRIMINAL LAW, 16.

COSTS.

See APPEAL, 1. VENUE, 4.

1. The amount of a note being in excess of the jurisdiction of a justice of the peace, the holder, suing for such amount as damages for breach of a contract by a bank to collect or return the note, was entitled to bring his action in the circuit court and, on recovery of nominal damages, to recover costs also. *W. H. Kiblinger Co. v. Sauk Bank,* 595

2. Upon affirmance of a judgment after modification reducing plaintiff's recovery the appellant is allowed to recover costs on the appeal. *Lyttle v. Goldberg.* 613

COUNTERCLAIM. See CONTRACTS, 12. VENDOR AND PURCHASER, 5.

COUNTIES.

County officers. See CONSTITUTIONAL LAW, 3, 4. CONTRACTS, 7. QUO WARRANTO, 2.

County orders. See CONTRACTS, 7. JUDGMENT, 1–4.

1. When county orders are adjudged void there is a total failure of consideration for a prior contract to purchase them. *Giblin v. North Wis. L. Co.* 261

2. In the sale of county orders there is an implied warranty that the seller has title and that they are not spurious, false, or counterfeit. *Ibid.*

Deed by county: Title conveyed.

3. A quitclaim deed signed in the name of a county by the county clerk pursuant to authority given him by the county board, under sec. 1193, Stats. (1898), to convey certain lands which had been tax-deeded to the county, is *held* to convey only the title and interest which had arisen under tax deeds taken out by the county upon certificates held at the time of the negotiation with the grantee, but no equitable title or interest which the county may have had prior to the tax sales in question. *Pinkerton v. Fenelon,* 440

COUNTY JUDGE.

See ELECTIONS, 2, 4.

1. Where the person elected to the office of county judge filed his oath of office with the county clerk, his failure to file it in the office of the clerk of the circuit court as required by sec. 2442, Stats. (1898), did not cause the office of county judge to become vacant, said statute being directory, in the absence of any pro-

vision expressly declaring a vacancy in case of such failure. *State ex rel. Dithmar v. Bunnell,* 198

2. The office of county judge did not become vacant merely because the person elected thereto failed, until three months after executing and filing his official bond, to have such bond recorded, as prescribed in sec. 702, Stats. (Supp. 1906; ch. 376, Laws of 1903). *Ibid.*

3. Relator was appointed on December 10, 1904, to fill a vacancy caused by death in the office of county judge. On April 4, 1905, defendant was elected for the unexpired term of the deceased judge, ending January 1, 1906. He duly qualified. Under the statutes then in force relator would hold the office until June 5, 1905, and on that day defendant would be entitled to it. On April 21, 1905, ch. 91, Laws of 1905, took effect, providing that "all county judges heretofore appointed to fill vacancies shall hold and continue in office until the first Monday in January, 1906." *Held,* that it was not competent for the legislature thus to nullify the election and continue the relator in office. *Ibid.*

4. Upon being refused possession of the office of county judge, the person entitled thereto was justified in forcibly breaking into the office room in the courthouse and taking possession thereof in the absence of the person who claimed such office and had excluded him. *Ibid.*

COUNTY SUPERVISOR OF ASSESSMENT. See CONSTITUTIONAL LAW, 3–9.

COURT AND JURY. See CRIMINAL LAW, 10–20. TRIAL, 5–15.

COURTS.

Supreme court. See APPEAL AND ERROR.

Circuit courts: Jurisdiction: Remission of record from supreme court.

1. After the expiration of the time within which the clerk of the supreme court is required by sec. 3071, Stats. (1898), to remit the papers in a cause to the circuit court, the circuit court has jurisdiction of the cause even though the record has not been remitted so as to be in its actual possession. *Murphy v. State,* 420

Same: Setting aside order of another circuit court.

2. An order incorporating a village, made by one circuit court under secs. 854–866, Stats. (1898), cannot be declared void or proceedings thereunder restrained in an action brought in another circuit court. The remedy, if any, is to be sought in the court in which the proceedings were instituted or upon appeal. *Salter v. Cook,* 20

Same: Clerk: Custody of grand jury list. See GRAND JURY, 1–3.

Municipal courts. See LIMITATION OF ACTIONS, 1–3.

Justices' courts. See JUSTICES' COURTS.

COVENANTS.

Agreement restricting use of land: Equitable servitude. See DEEDS, 2.

1. Where an instrument restricting use was executed in pursuance of a general scheme for the purpose of preserving the character of real estate as first-class residence property "by present owners and future purchasers of the same," the restriction created an equitable servitude. *Boyden v. Roberts,* 659

2. Such a restriction must be regarded as of value to the whole property and inserted for the benefit of those who become owners of separate parcels, and is binding in equity on a grantee of a portion of the premises with notice. *Ibid.*

3. Where a covenant in the form of a restriction is appurtenant to the land, the right to enforce it in equity passes with the land. *Ibid.*

4. The doctrine of equitable servitude is one largely of intention to be deduced from the agreement. *Ibid.*

5. The controlling question in determining whether an equitable servitude exists is whether the original parties so intended. *Ibid.*

6. The form of an agreement used to create a restriction in the nature of an equitable servitude is not material. Words of covenant are as effectual as words of grant. *Ibid.*

7. The owner of a tract of land with lake frontage, at the time of conveying a portion thereof and as part of the same transaction, made an agreement with the grantee that the character of the whole tract as first-class residence property should be preserved by them and by future purchasers, and that no part thereof should at any time be occupied, sold, or used by either of them or their heirs, executors, or assigns for hotel, club, or camping purposes, or for any reformatory, charitable, or penal institution. The agreement provided that it should be binding upon the respective heirs, executors, administrators, and assigns of the parties thereto and should constitute a covenant running with the land. The deed made no reference to the agreement. *Held*, that the instruments, construed together, impressed upon the whole tract and upon every part thereof an equitable servitude for the benefit of all purchasers and binding upon all purchasers having notice thereof, and that the specified restrictions upon the use of the property could be enforced by subsequent purchasers of parcels of the portion originally retained by the owner against other such purchasers chargeable with notice of the agreement, although all claimed under mesne conveyances from such owner containing no restriction and no reference to the agreement. *Ibid.*

8. The restriction being for the benefit of all portions of the property, each purchaser took his portion with the right to enforce the restriction against other grantees of portions of the property with notice. *Ibid.*

9. No reference to the agreement in deeds of portions of the premises was necessary in order to enable grantees with notice to enforce the restriction *inter sese*. *Ibid.*

10. The maintenance on said tract of a neighborhood clubhouse for social purposes in connection with golf grounds, and of a pier and boat landing for the accommodation of members and their families and guests, would constitute a violation of said agreement. *Ibid.*

CRIMINAL LAW AND PRACTICE.

Responsibility for crime: Insanity. See CRIMINAL LAW, 13, 14.

1. However sane one may have been at all other times, if he was actually insane within the legal definitions at the time he committed the criminal act he is not responsible. *Duthey v. State*, 178

2. One cannot be held criminally responsible for acts done while he was actually insane, even though his mental state was brought about by his own fault in yielding to anger or passion. *Ibid.*

Same: Evidence: Opinions.

3. When a nonexpert witness is to be asked his opinion as to a person's sanity the question should be, substantially: What impression was made upon your mind by the conduct, actions, manner, expressions, and conversation which you observed? *Duthey v. State,* 178

4. A physician was asked whether, assuming the truth of certain facts stated and of the testimony of the defendant which he heard, he saw in those facts and that testimony any indication that defendant was suffering at any time from melancholia. *Held,* that the question was proper and that answers thereto by the witness, "I see no signs of melancholia," and "There is no evidence of melancholia in that testimony," were not objectionable in form. *Ibid.*

Evidence: Reading minutes of testimony: Stenographic reporter.

5. Upon the trial of the issue of guilty, permitting the court reporter to read his minutes of the testimony given by defendant on the trial of the issue of sanity was not error merely because there was no other reporter to take down the oral testimony so read to the jury. *Duthey v. State,* 178

Same: Conclusiveness of defendant's declarations. See HOMICIDE, 5.

Same: Weight and sufficiency. See HOMICIDE, 4, 8.

Trial: Calendar: Record not remitted from appellate court: Notice.

6. The fact that the record in a criminal case had not been remitted from the appellate court to the circuit court when the cause was placed on the trial calendar of the latter court was a mere irregularity not affecting any substantial right of the defendant, where such record was thereafter remitted and was in the court when the trial was commenced *Murphy v. State,* 420

7. There being no statute or rule requiring notice to be given of the placing of a criminal cause upon the trial calendar of the circuit court, no such notice to the defendant is necessary. *Ibid.*

8. The circumstances under which defendants in criminal cases are to be put upon trial are largely within the discretion of the trial courts, guided by the constitutional guaranties of the right to speedy trial and of reasonable opportunity to prepare and make defense. *Ibid.*

Arguments and conduct of counsel.

9. Where the district attorney in his opening remarks to the jury improperly stated that he expected to prove a certain fact, but the trial judge promptly stopped him and stated that such proof would not be allowed, and there was no objection or exception taken to the remark and no request for any instruction or caution to the jury on the subject, there was no prejudicial error. *Heubner v. State,* 162

Instructions to jury. See HOMICIDE, 1.

10. If, in charging the jury, the court attempts to summarize and declare the contentions made by either party he should do it with great care and only after being assured that he appreciates not

only what those contentions are but their relative importance as viewed by counsel. *Duthey v. State,* 178

11. To be a ground of reversal, an omission from such a statement by the court should have been called to the attention of the trial court by a request that the thing omitted be supplied. *Ibid.*

12. It is the duty of the trial court, especially when so requested, to instruct the jury specifically as to their duty to acquit if they entertain a reasonable doubt as to the guilt of the defendant. *Ibid.*

13. Although upon the trial of the issue as to insanity of the defendant the presumption is in favor of sanity, the jury should not be instructed that this throws upon him the burden of proof and that to escape he must produce evidence of insanity sufficient to raise a reasonable doubt. The proper instruction is simply that if, after considering all the evidence before them, there remains in the minds of the jury any reasonable doubt of sanity, they should find the defendant insane. *Ibid.*

14. It was error to instruct the jury, in effect, that if defendant while sane determined upon the killing of the deceased he must be found sane although thereafter he became insane and was so at the time of the homicide. *Ibid.*

15. A requested instruction to the effect that the testimony as to the good reputation of defendant as to his honesty and integrity might, if believed, be in itself sufficient to raise a reasonable doubt as to his guilt, is *held* to have been properly denied. Such testimony should be considered in connection with all the other evidence. *Niezorawski v. State,* 166

16. A requested instruction, with reference to testimony as to the bad reputation of a witness for truth and veracity, as follows: "If from such testimony you are satisfied that the said witness has been impeached, or you have a reasonable doubt on account of such testimony as to his credibility, you should disregard his testimony given in this case, except as to those parts, if any, in which such testimony has been corroborated by other credible witnesses," was properly denied because it directed, not merely permitted, the jury to disregard his testimony, because it limited the corroboration to testimony of witnesses, thereby excluding circumstances and documents, and because it required corroboration by more than one witness. *Ibid.*

Jurors: Separation before being sworn.

17. Mere separation of the jurors before they were impaneled and sworn is not ground for reversal of a conviction in a capital case. *Heubner v. State,* 162

Statements by trial judge to jury.

18. A cautionary statement by the trial judge to the jury before the examination of witnesses, as follows: "You will listen to the evidence of each of the witnesses, and bear in mind the appearance of the witnesses upon the stand and the impress that the evidence of these witnesses makes upon your mind, and especially as to whether the evidence is credible or truthful or is not the truth," *held* entirely proper. *Heubner v. State,* 162

19. It was improper for the trial court, in reply to a question asked by the jury while they were deliberating upon the issue of sanity, to inform them that if they found the defendant sane the

same jury would afterwards pass upon the question of his guilt or innocence. The court should have told them that such information had no relevancy to their duty in respect to the issue before them. *Duthey v. State*, 178

20. Conduct of the trial judge is criticised, in that he took occasion, when the jury had returned into court during their deliberations, to explain his course and vindicate his acts and motives, with reference, particularly, to a complaint of defendant's counsel, in his argument, that the lower degrees of homicide had not been submitted to the jury. The minds of the jury should not have been diverted from their duty by any discussion as to propriety of conduct of court or counsel. *Ibid.*

Verdict: Compromise: Recommendation of mercy.

21. The facts that a verdict of guilty was accompanied by a recommendation of mercy, and that before separating the jury handed to the judge a written request for leniency toward the defendant, do not show that the verdict was a compromise verdict which must be set aside. *Niezorawski v. State*, 166

Appeal and error: Exceptions available.

22. Under secs. 4659, 4706, Stats. (1898), no exceptions are available in a criminal case except such as relate to rulings which the appellate court can see, from the record returned, actually prejudiced the defendant in his defense upon the merits. *Niezorawski v. State*, 166

Bribery. See ELECTIONS, 4.

Murder and manslaughter: Degrees. See HOMICIDE.

CROSS-COMPLAINT. See PLEADING, 3–5.

CUMULATIVE EVIDENCE. See NEW TRIAL, 2.

DAMAGES.

Breach of contract: Nominal damages, when recoverable.

1. For breach of an agreement by a bank to return to the holder at a certain time a note sent to the bank for collection, the holder was entitled to recover nominal damages although it was found that even if the note had been returned there was no probability that the maker would have paid it. *W. H. Kiblinger Co. v. Sauk Bank*, 595

Same: Failure to prove damage. See TRIAL, 7.

For taking of property for public use. See MUNICIPAL CORPORATIONS, 4.

Measure of damages: Pleading: Instructions to jury.

2. In an action for loss of services, expenses, etc., by reason of plaintiff's infant son having been disabled through defendant's negligence, the complaint alleged that the son was struck by a swinging block and knocked down into the hold of a vessel, resulting in a swelling on his cheek, intense pain, confinement to his bed for six weeks, and a concussion of the spine, and that the injuries were of a permanent nature, etc. *Held* that, giving the complaint a liberal construction, there could be a recovery thereunder of all the damages which in law are consequent upon the breach of duty alleged, and not merely of those resulting from the concussion of the spine. *Johnson v. St. Paul & W. Coal Co.* 627

3. For the services of his wife in nursing his infant son injured through defendant's negligence, a father may recover an amount not exceeding that for which he could have employed others to do the work. *Ibid.*

4. In an instruction that the father might recover for expenses necessarily incurred in *caring* for his son during the illness resulting from the injury, including medical services, etc., the word "caring" was clearly used as a synonym for "nursing," and the instruction was proper. *Ibid.*

5. An instruction that plaintiff was entitled to recover "such sum as will fully compensate him for the loss of his eye and the disadvantage, disfigurement, and inconvenience it is reasonably certain from the evidence will result from such loss," is *held* not to have misled the jury to understand that they might duplicate the damages by allowing full compensation for the loss of the eye and further compensation for the resulting disadvantage, disfigurement, and inconvenience. *Hocking v. Windsor S. Co.* 532

Itemizing damages in verdict. See TRIAL, 19.

Excessive damages. See APPEAL, 14, 16. LIBEL.

6. In a tort action for unliquidated damages a verdict will not be set aside on the ground that it is excessive unless the excess is such as to create the belief that the jury was misled by passion, prejudice, or ignorance. *Flannigan v. Stauss,* 94

7. An award of $3,500 as damages for the death of a brakeman about eighteen years old who was earning $80 per month and whose parents, sixty-one and fifty-two years old respectively, were in poor health and largely dependent on him for support, is *held* not excessive. *Hayes v. C., M. & St. P. R. Co.* 399

8. An award of $5,000 for the loss of an eye, involving much pain and suffering, is *held* not excessive. *Hocking v. Windsor S. Co.* 532

9. An award of $5,000 for injuries to a laborer forty years old which left his hand in a mutilated and practically useless condition, is *held* not excessive. *Walker v. Simmons Mfg. Co.* 542

10. An award of $1,000 to a father for loss of services of his son during the four and three-fourths years of the latter's minority remaining after he was injured is *held* not excessive. *Johnson v. St. Paul & W. Coal Co.* 627

DEEDS.

Acknowledgment before notary outside of state.

1. The acknowledgment of a deed taken by a notary public outside of this state and certified to in substantially the form prescribed by our statutes, with the impression of his seal, is sufficient to make the deed admissible in evidence in an action in this state, without having annexed thereto an additional certificate that the notary public was such officer. *Washburn Land Co. v. Swanby,* 1

Recording: Notice. See COVENANTS, 2, 7, 9. MORTGAGES, 1. VENDOR AND PURCHASER, 9, 10.

2. An agreement between the owner of a tract of land and the purchaser of a part thereof, restricting the use of the whole tract and creating an equitable servitude, was an instrument by

which the title to the real estate might "be affected in law or equity" and hence was a "conveyance" as defined in sec. 2242, Stats. (1898), and the record thereof was constructive notice to all subsequent purchasers. *Boyden v. Roberts*, 659

Construction: Exception or reservation?

3. A conveyance of land by a man seventy-six years old contained, after the description, the following: "saving, excepting and reserving for himself, the grantor herein, all the timber now growing and standing on the south half of the said premises, with the right at all times to enter on the said premises to cut and haul the said timber away during the next forty years, but the grantor herein agrees to cut and haul away each year what is necessary for him for firewood and other uses on the grantor's farm." *Held*, that this constituted an exception of the timber from the grant, and that the grantor's title thereto, so retained by him, was real estate which, at his death, would pass to his heirs or devisees, subject to the limitation of forty years for its removal. TIMLIN, J., dissents, being of the opinion that the language quoted constituted a reservation, not an exception. *Williams v. Jones*, 361

Same: Deed executed in official character: Title conveyed. See COUNTIES, 3.

4. A quitclaim deed executed by one in an official or representative character is to be given no greater effect than is warranted by the authority conferred upon him. *Pinkerton v. Fenelon*, 440

Agreement restricting use of land: Equitable servitude. See COVENANTS.

Tax deeds. See TAX TITLES.

DEFINITIONS. See WORDS AND PHRASES.

DEGREES of murder or manslaughter. See HOMICIDE, 1–7.

DELAY. See PLEADING, 6. SUBROGATION, 3.

DEMAND.
Of performance of contract. See MASTER AND SERVANT, 5–8.
For change of venue. See VENUE, 1–3.

DEMURRER. See CORPORATIONS, 2. MASTER AND SERVANT, 20, 21, 24. PLEADING, 1–5.

DESCRIPTION of land. See JUDGMENT, 5. TAX TITLES, 14.

DISCRETION. See CONTINUANCE. CONTRACTS, 6. CRIMINAL LAW, 8. PLEADING, 6. TRIAL, 19.

DISMISSAL of action. See JUDGMENT, 6.

DISTRICT ATTORNEY. See CRIMINAL LAW, 9.

DOCKET. See JUSTICES' COURTS, 1.

DONATIO MORTIS CAUSA. See GIFTS.

DOWER. See EJECTMENT, 1. HUSBAND AND WIFE, 2. LIENS, 8.

DRAINAGE of land. See WATERS.

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 10, 11. GUARDIAN AND WARD, 2.

EASEMENTS AND SERVITUDES. See COVENANTS.

EJECTMENT.

See TAX TITLES, 10–13.

1. The existence of an inchoate right of dower in the wife of a former owner of land does not preclude the present owner from recovering possession of the land in an action of ejectment against a tax-title claimant. *Washburn Land Co. v. Swanby,* 1

2. Where plaintiff in ejectment is entitled to recover by reason of defects in the tax title under which defendant claims, the direction and order for judgment should follow the statute, sec. 3087, Stats. (1898), and should determine the amount to be paid by plaintiff to defendant as a condition of judgment in plaintiff's favor. *Ibid.*

3. Where plaintiff in ejectment is entitled to recover by force of a paramount title founded on a tax sale later than the tax sale on which defendant's claim is based, or because the land had been redeemed from a tax sale before the tax deed thereon was issued to defendant, he is not entitled to recover "by reason of a defect or insufficiency of any tax deed under which the defendant claims title," and should therefore not be required, under sec. 3087, Stats. (1898), to pay to defendant the taxes paid by the latter. *Doolittle v. J. L. Gates L. Co.* 24

ELECTION.

To terminate or continue contract. See CONTRACTS, 8. VENDOR AND PURCHASER, 2, 3, 7.

Between causes of action. See VENDOR AND PURCHASER, 8.

By devisees against conversion of realty. See WILLS, 4.

ELECTIONS.

See COUNTY JUDGES, 3. INTOXICATING LIQUORS, 3, 4. JUDGMENT, 6. SCHOOLS, 3.

1. Under subd. 3, sec. 30, Stats. (1898), providing that each voter signing a nomination paper shall add to his signature his business and residence, the use of ditto marks (") placed under the business or residence of some former signer is permissible. *State ex rel. Dithmar v. Bunnell,* 198

2. At an election to fill the office of county judge for an unexpired term and also for a new term thereafter, separate nomination papers for each term were necessary; and after a nomination paper specifying merely the office of "county judge" had been signed the candidate had no right to change it by interlining the words "for the unexpired term." *Ibid.*

3. After the name of a candidate has been placed upon the official ballot and the election has taken place, the fact that there had been a wrongful alteration in his nomination papers does not of itself require the rejection of the votes cast for him at the election. *Ibid.*

4. It is bribery, under sec. 4478, Stats. (1898), for a candidate for the office of county judge to promise the voters, before the election, that if elected he "will draw all papers necessary in the settlement of estates and give the necessary advice free of charge." But such a promise, in the absence of any proof that any voter was induced thereby to vote for such candidate, is

not sufficient ground for rejecting the votes cast for him or ousting him from the office. *Ibid.*

EMINENT DOMAIN. See MUNICIPAL CORPORATIONS, 4. RAILROADS, 1-3.

EQUITABLE CONVERSION. See WILLS, 4.

EQUITABLE SERVITUDE. See COVENANTS. DEEDS, 2.

EQUITY. See COURTS, 2. COVENANTS. HUSBAND AND WIFE, 1. LIENS, 8, 9. MORTGAGES. PARTITION. PATENTS. PRINCIPAL AND SURETY. SUBROGATION. TAX TITLES, 3. VENDOR AND PURCHASER, 5, 6. WATERS, 4. WILLS, 4.

ESTATES in land. See PARTITION, 1, 2.

ESTATES OF DECEDENTS. See EXECUTORS. FRAUD. MASTER AND SERVANT, 8. SUBROGATION, 2, 3. TRIAL, 6. WILLS.

ESTOPPEL. See CONTRACTS, 10. LIENS, 4. TAX TITLES, 11.

EVIDENCE.

Presumptions and burden of proof. See ANIMALS, 1, 2. CRIMINAL LAW, 13. NEGLIGENCE. SCHOOLS, 1. TAX TITLES, 5, 15. TRIAL, 12-14. VENDOR AND PURCHASER, 1.

Relevancy, materiality, and competency. See BROKERS, 6. PRINCIPAL AND SURETY, 6, 7. SALES, 10, 11, 14, 15.

1. When evidence is introduced by one party tending to raise an unfavorable inference as to the claim of the adverse party, evidence of an explanatory character reasonably tending to rebut such unfavorable inference may be allowed which might in the absence of the adverse evidence be clearly inadmissible. *Anderson v. Arpin H. L. Co.* 34

Same: Evidence of price and reasonable value.

2. In case of a dispute as to the contract price for work, in order to render evidence of the reasonable value thereof admissible there must be a direct conflict as to the contract price, and the difference between the claims of the parties must be so great that the reasonable value may discredit the evidence on one side and corroborate that on the other, affording some reasonable ground for believing that the contract was at the price most in harmony with such evidence. *Anderson v. Arpin H. L. Co.* 34

3. Such evidence must be directed to the reasonable value of the work from the standpoint of the parties when the contract was made. *Ibid.*

4. The question of the relevancy or competency of such evidence must be decided in each case according to the particular circumstances, and the ruling of the trial court, unless clearly wrong and prejudicial, should not be disturbed on appeal. *Ibid.*

5. In an action to recover for work done in piling lumber, where plaintiff claimed that the agreed price was seventy cents per thousand feet and defendant claimed that it was sixty-five cents, the difference is *held* not so great as to render erroneous the exclusion of evidence as to the reasonable value of the work. *Ibid.*

Same: Refreshing recollection.

6. In an action to recover for services in piling lumber under a contract, defendant's bookkeeper having testified without ob-

jection that he had paid plaintiff's employees as requested by him and had charged the amounts accordingly, it was competent for him to testify to the aggregate of such payments, refreshing his memory from the books. *Anderson v. Arpin H. L. Co.* 34

Admissions and declarations. See HOMICIDE, 5. RAILROADS, 2.

Documentary evidence: Minutes of school board meetings. See SCHOOLS, 1.

Parol evidence affecting writings. See INSURANCE, 4.

Opinion evidence. See CRIMINAL LAW, 3-5. PHYSICIANS AND SURGEONS. SALES, 15.

7. The issue being as to the liability of a district superintendent for losses sustained by an insurance company through fraud of an agent in the district, an insurance inspector was asked whether the fraud would have been possible if collection books had been properly kept by each agent and had been examined and their condition known and reported to the company by the superintendent; and was also asked what such inspection and report would have shown as to the condition of the business. *Held*, that the questions called for inferences of fact not the subject of expert knowledge and which it was the province of the jury to draw. *McKone v. Metropolitan L. Ins. Co.* 243

8. In an action for injuries to a servant caused by a splinter broken from a die in a punch press, testimony of witnesses that they had examined and compared, with the aid of a magnifying glass, the splinter and the crevice in the die produced by plaintiff, and had tested the material of both as to hardness and similarity of surface and grain, and that from such examination they could state that the splinter came from that die, was competent and proper. *Hocking v. Windsor S. Co.* 532

9. Expert testimony to the effect that the die was improperly set, based on the facts that it sheared and that the knife of the die became loosened as it was operated, and on the marks appearing on the dies, was also proper. *Ibid.*

10. Plaintiff's counsel, in presence of the jury, asked that certain opinion evidence introduced by him be stricken out and the jury requested not to consider it. The court stated: "The motion is granted and the jury is so instructed," but gave no further instruction on the subject. *Held*, that this ruling, in connection with the language of counsel's request, sufficiently informed the jury that the evidence in question was not to be considered. *Ibid.*

Weight and sufficiency of evidence. See ANIMALS, 3. CHAMPERTY. CONTRACTS, 17. CRIMINAL LAW, 15, 16. HOMICIDE, 5, 8. INSURANCE, 3. MASTER AND SERVANT, 1, 2. MORTGAGES, 5. RAILROADS, 5, 6, 10. SALES, 5, 6, 13.

11. In an action to recover for work in piling lumber, alleged to have been done at a stipulated price, the evidence is *held* to warrant a finding by the jury that there was an agreed price for the work. *Anderson v. Arpin H. L. Co.* 34

Errors in admission or exclusion: Materiality. See APPEAL, 13, 15.

Examination of witnesses. See WITNESSES.

Newly-discovered evidence as ground for new trial: Cumulative evidence. See NEW TRIAL, 1, 2.

EXAMINATION of witnesses. See WITNESSES.

EXCEPTION or reservation? See DEEDS, 3.

EXCEPTIONS. See APPEAL, 2, 3. CRIMINAL LAW, 22.

EXCEPTIONS, BILL OF. See APPEAL, 1, 4.

EXCESSIVE DAMAGES. See APPEAL, 14, 16. DAMAGES, 6–10. LIBEL.

EXCISE LAWS. See INTOXICATING LIQUORS.

EXCUSABLE HOMICIDE. See HOMICIDE, 7.

EXECUTION. See APPEAL, 4, 5.

EXECUTORS AND ADMINISTRATORS.

See FRAUD. MASTER AND SERVANT, 8. SUBROGATION, 2, 3. TRIAL, 6. WILLS.

In an action by an administrator for a wrongful conversion of household goods of his decedent, it is *held* upon the evidence that it was a question for the jury whether defendant had refused to allow plaintiff to take possession of the property. *Schultz v. Becker*, 235

EXECUTORY CONTRACTS: Right of party to withdraw. See CONTRACTS, 8.

EXPERT TESTIMONY. See CRIMINAL LAW, 4. EVIDENCE, 7–10. PHYSICIANS AND SURGEONS. SALES, 15.

EXTENSION of time. See LIENS, 4. LIMITATION OF ACTIONS, 4.

FALSE REPRESENTATIONS. See BILLS AND NOTES, 1, 6. CONTRACTS, 9–11. PRINCIPAL AND SURETY, 1, 2.

FEES of witnesses. See VENUE, 4.

FELLOW-SERVANTS. See MASTER AND SERVANT, 20–24. RAILROADS, 10.

FILING oath of office, bond, etc. See COUNTY JUDGE, 1, 2. GRAND JURY, 4.

FINDINGS OF FACT. See APPEAL, 7, 9–11, 20.

FORECLOSURE.
Of mechanics' liens. See LIENS, 8, 9.
Of mortgages. See LIENS, 8, 9. LIMITATION OF ACTIONS, 4. MORTGAGES, 6.

FOREIGN CORPORATIONS. See CORPORATIONS, 2.

FRAUD.

See BILLS AND NOTES, 1, 6. CONTRACTS, 9–11. JUDGMENT, 1–4. PRINCIPAL AND SURETY, 1, 2. TRIAL, 6. VENDOR AND PURCHASER, 8, 9.

The question whether the maker of a note owned by a decedent was a party to a fraud through which a payment was made to the widow instead of to the executor, so as to preclude a recovery by such maker from the widow, is *held* upon the evidence to have been one for the jury. *Paulus v. O'Neill*, 69

FRAUDS, STATUTE OF.

See HUSBAND AND WIFE.

An oral agreement authorizing one as agent to purchase property for another from a third person is not within the statute of frauds—sec. 2308, Stats. (1898)—relating to contracts for the "sale of goods," etc. *Wiger v. Carr*, 584

GARNISHMENT. See APPEAL, 4, 5.

GENERAL APPEARANCE. See JUSTICES' COURTS, 2.

GIFTS.

To be valid, a gift *mortis causa* must take effect during the life of the donor as an executed and complete transfer of the possession and title, either legal or equitable, to the donee. *Schultz v. Becker*, 235

GOOD WILL. See CONTRACTS, 5.

GRADING of streets. See MUNICIPAL CORPORATIONS, 3, 4.

GRAND JURY.

1. Under sec. 2546*a*, Stats. (Supp. 1906; Laws of 1903, ch. 90), requiring the record book in which the grand jury list is entered to be deposited with "the clerk of the court of such county, who shall securely keep the same so that the" list shall not become known, such book is to be deposited with the clerk of the circuit court. *Niezorawski v. State*, 166
2. When a grand jury is to be drawn in a municipal court or other inferior court, the grand jury list, after being deposited with the clerk of the circuit court, is to be removed (in proper custody) to the office of the clerk of such inferior court, and is to be returned after the drawing. *Ibid.*
3. The fact that a book so removed remained in the office of the clerk of the inferior court for some months and until after a second grand jury was drawn from the list, was an irregularity, but in this case not prejudicial. *Ibid.*
4. The oath which the stenographer employed by a grand jury is required by sec. 2546*f*, Stats. (Supp. 1906; Laws of 1903, ch. 90), to "make and file," should probably be filed with the clerk of the grand jury, but an error in this respect would not make the stenographer a disqualified person or an interloper among the grand jurors, or be prejudicial. *Ibid.*

GUARANTY. See PRINCIPAL AND AGENT, 2.

GUARDIAN AND WARD.

1. Sec. 3995*c*, Stats. (Supp. 1906; Laws of 1905, ch. 89), does not authorize the appointment of a special guardian after the appointment and qualification of a guardian, even though an appeal has been taken from the order of appointment and a stay of proceedings had. *State ex rel. Deleglise v. Parsons*, 606

[2. Whether sec. 3995*c*, Stats. (Supp. 1906; Laws of 1905, ch. 89), which provides for appointment of special guardians without notice, is valid, not determined.] *Ibid.*

HEAT OF PASSION. See HOMICIDE, 4, 5.

HIGHWAYS. See RAILROADS, 8, 9.

HOMICIDE.

See CRIMINAL LAW, 14, 20.

1. Refusal by the trial court to submit the question whether defendant was guilty of a lower degree of homicide than that of which he was convicted was prejudicial error if the evidence, in any reasonable view, could support a conviction of such lower degree. *Duthey v. State,* 178

2. Where the killing was by a pistol discharged by the volition of the defendant, without any element of accident or inadvertence, it was not an "involuntary" killing within the meaning of secs. 4355, 4362, Stats. (1898). *Ibid.*

3. The killing of defendant's wife with a pistol, claimed by him to have been done while he was temporarily insane because of her misconduct, is *held* upon the evidence not to have been within sec. 4363, Stats. (1898), covering "every other killing," etc., than those covered by other sections. *Ibid.*

4. Upon the evidence (stated in the opinion) it is *held* that the jury might have found that the killing of his wife by defendant with a pistol was in heat of passion and without a design to effect death so as to make the crime manslaughter in the third degree, as defined in sec. 4354, Stats. (1898). *Ibid.*

5. A defendant's own declarations, even under oath as a witness, are not conclusive against him if other evidence justifies an inconsistent conclusion as to the fact. Thus, defendant's testimony asserting delirium and unconsciousness of his acts at the time of killing his wife did not preclude the jury from finding from other evidence that there was merely that blind anger which the law calls heat of passion. *Ibid.*

6. A killing not involving any element of self-defense or enforcement of a duty cannot be a justifiable homicide under sec. 4366, Stats. (1898). *Ibid.*

7. A killing by the use of a dangerous weapon cannot be an excusable homicide under sec. 4367, Stats. (1898). *Ibid.*

8. Upon a prosecution for the murder of defendant's bastard child, the evidence is *held* sufficient to show that the child was born alive and had an independent existence with respiration and circulation before the act was committed. *Heubner v. State,* 162

HORSES. See ANIMALS. RAILROADS, 8, 9.

HUSBAND AND WIFE.

See BILLS AND NOTES, 2. CORPORATIONS, 1. DAMAGES, 3. LIENS, 8, 9.

1. A mortgage of her separate property given by a married woman to secure payment of her husband's obligation is valid and enforceable in equity, and, no liability at law on her part being involved, the statute of frauds relating to the promise of one person to answer for the debt of another and the law respecting a wife's incapacity to incur a legal liability as surety for her husband have no application. *Goll v. Fehr,* 141

2. A fully executed release by a married woman of her interest (even inchoate) in real estate is a sufficient consideration for a promise to pay a sum of money for such release, and neither

her marital status nor the statute of frauds presents any obstacle to the validity of such promise. *Lyttle v. Goldberg*, 613

IMPEACHMENT of witness. See CRIMINAL LAW, 16.

IMPROVEMENTS: Special assessments. See MUNICIPAL CORPORATIONS, 1–4.

INDEMNITY for illness. See INSURANCE, 3, 4.

INFANTS. See MASTER AND SERVANT, 25, 26. WILLS, 1, 2.

INJUNCTION. See CONTRACTS, 6. COURTS, 2.

INSANITY. See CRIMINAL LAW, 1–5, 13, 14, 19. HOMICIDE, 3.

INSOLVENCY. See VENDOR AND PURCHASER, 5.

INSTRUCTIONS TO JURY. See APPEAL, 2, 3. CRIMINAL LAW, 10–16. DAMAGES, 4, 5. EVIDENCE, 10. MASTER AND SERVANT, 12, 13, 18, 25. PRINCIPAL AND AGENT, 3. RAILROADS, 11–15. TRIAL, 8–15.

INSURANCE.

Life insurance: Rebate of premium: Validity of policy.

1. Under sec. 1955o, Stats. (1898), the fact that a rebate of premium is paid or allowed does not render a policy of life insurance itself either illegal or invalid, and after its delivery and acceptance premiums paid thereon cannot be recovered by the insured. *Urwan v. N. W. Nat. L. Ins. Co.* 125 Wis. 349, distinguished. *Laun v. Pacific Mut. L. Ins. Co.* 555

[2. Whether under said sec. 1955o a rebate of premium is legal if specified in the policy, not determined.] *Ibid.*

Illness indemnity: Evidence: Varying terms of policy.

3. In an action to recover an illness indemnity under a policy of insurance, findings to the effect that the insured contracted an acute illness and by reason thereof was necessarily and continuously confined strictly to his house and was regularly visited by a qualified physician, are *held* to have no support in the evidence. *Rief v. Continental Casualty Co.* 368

4. There being no claim of fraud or mistake and no foundation laid for a reformation of the policy, evidence to vary or contradict the terms of the policy was not admissible. *Ibid.*

INTENTION. See COVENANTS, 4, 5.

INTEREST. See LIMITATION OF ACTIONS, 4.

INTOXICATING LIQUORS.

See JUDGMENT, 6.

1. Since the enactment of ch. 307, Laws of 1883 (amending the Milwaukee city charter), all general laws affecting liquor licenses apply to the city of Milwaukee unless in themselves they show a legislative purpose to the contrary. *State ex rel. Faber v. Hinkel*, 103

2. Ch. 296, Laws of 1885—secs. 1548, 1548*b*, Stats. (1898)—as to the amount of the license fee and as to the manner of increasing that amount, is applicable to the city of Milwaukee. *Ibid.*

3. Ch. 296, Laws of 1885, prescribed a fixed sum ($200) as the license fee, and when at an election as therein prescribed a

majority vote is cast in favor of a higher sum, such latter sum is "required by the general law." *Ibid.*

4. In case of such a result of an election in the city of Milwaukee, the charter itself, as amended by ch. 307, Laws of 1883, commands the common council to charge the higher sum for licenses. *Ibid.*

INVOLUNTARY KILLING. See HOMICIDE, 2.

INVOLUNTARY PAYMENT. See PLEADING, 2.

JUDGES, Conduct of. See CRIMINAL LAW, 20.

JUDGMENT.

Condition of recovery. See EJECTMENT, 2, 3.

Docketing: Transcript. See LIMITATION OF ACTIONS, 2, 3.

Modification. See APPEAL, 24. COSTS, 2.

Vacating. See APPEAL, 24.

Reversal on appeal. See APPEAL, *Affirmance and reversal.*

Direction of judgment by appellate court. See APPEAL, 21–23.

Conclusiveness of judgment: Bar to subsequent action. See APPEAL, 17–19.

1. Where both the payee named in county orders and his assignee were defendants in a taxpayers' action to have the orders declared fraudulent and void, it was not necessary for the assignee to tender the defense of the action to the payee in order to make the judgment conclusive as between them. *Giblin v. North Wis. L. Co.* 261
2. In such case the payee named in the orders and his assignee were in privity in the action with respect to the invalidity of the orders. *Ibid.*
3. Where the plaintiff makes a claim hostile to each and every defendant in the suit, asserting that an instrument for the payment of money in which each defendant has or claims an interest, either as present holder or as privy to the present holder by reason of being a transferrer of such holder, is fraudulent and void and obtains judgment to that effect, the instrument must be held fraudulent and void in any subsequent litigation between the same parties, however they may be arrayed therein against one another. *Ibid.*
4. A judgment in a taxpayers' action canceling and declaring void certain county orders is *quasi in rem* and establishes *prima facie*, as against all persons, the status of such orders. *Ibid.*
5. A judgment, in an action to foreclose a mortgage, declaring the mortgage void because it wholly failed to describe any land, is *res judicata* in a subsequent action to reform and foreclose the same mortgage, brought against the same defendants by a transferee of the former plaintiff. *Tio v. Brown,* 573
6. Where in a *mandamus* action to compel a city clerk to give notice of a special election as provided in sec. 1548*b*, Stats. (1898), the petition was dismissed for failure of the relator to amend it after the overruling of a demurrer to the return, there being no decision on the merits, the judgment of dismissal is not a bar to a subsequent similar action by the same relator against the same person as city clerk, based upon another request for a special election. *State ex rel. Faber v. Hinkel,* 103

Payment by surety: Voluntary or involuntary? See PLEADING, 2.
Action on judgment. See LIMITATION OF ACTIONS, 1-3.
Judgment as "due process of law." See CONSTITUTIONAL LAW, 10.
JURISDICTION. See APPEAL, 4, 5, 24-27. CERTIORARI. COURTS. JUSTICES' COURTS. VENUE, 6.

JURY.

Examination of jurors.
Metaphysical inquiries as to the effect on a juror's mind of the finding of an indictment against the defendant are not within the proper scope of the examination as to his qualifications; and a juror is *held* qualified notwithstanding he testified that he thought in such a case there was a greater possibility or more likelihood of guilt. *Niezorawski v. State,* 166
Conduct of jurors. See CRIMINAL LAW, 17, 21. NEW TRIAL, 3.
Grand jury. See GRAND JURY.

JUSTICES' COURTS.

1. A statement in a justice's docket that at the return hour of process all parties were present "in court" is equivalent to a statement that all parties appeared. *State ex rel. Haeselich v. Schweitzer,* 138
2. A general appearance is a waiver of defects in the form or service of process. *Ibid.*
3. A justice is not required, under sec. 3623, Stats. (1898), to wait one hour for the appearance of the parties if they appear sooner. *Ibid.*
4. An adjournment within the discretionary power of a justice under sec. 3365, Stats. (1898), does not deprive him of jurisdiction merely because made on plaintiff's motion. *Ibid.*
JUSTIFIABLE HOMICIDE. See HOMICIDE, 6.
LACHES. See LIMITATION OF ACTIONS, 8.
LAND CONTRACT. See VENDOR AND PURCHASER.
LATERAL SUPPORT. See MUNICIPAL CORPORATIONS, 4.
LEADING QUESTIONS. See APPEAL, 15. WITNESSES.

LIBEL AND SLANDER.

A verdict awarding $500 damages for the speaking of slanderous words imputing unchastity to a woman is *held* not so excessive as to make it the duty of the court to set it aside, although there was evidence tending to show that the words were spoken in quarrel. *Flannigan v. Stauss,* 94
LICENSES.
To sell liquor. See INTOXICATING LIQUORS.
To make and sell patented article: Revocation. See PATENTS.

LIENS.

For labor only partly lienable.
1. Where a lien is claimed for the amount due for labor, part of which is lienable and part not lienable, and there is no proof produced so that the one can be separated from the other with

reasonable certainty, the entire claim for a lien must be denied. *McGeorge v. Stanton-DeLong L. Co.* 7

For labor, materials, etc.: Consent of landowner to improvement.

2. Plaintiff drilled a well on defendant's land at the request of one R., who paid for the work but not for the casing or tubing furnished by plaintiff. Before starting the work plaintiff asked defendant who was to pay for the casing, and defendant told him that R. was to furnish the well complete, and that he (defendant) would not pay for anything in connection with it. *Held*, that defendant did not *consent* to the improvement, within the meaning of sec. 3314, Stats. (1898), so as to give plaintiff a right to a lien on the land for the materials furnished. *Clark v. North*, 599

Same: Subcontractors: Notice of claim, etc.

3. Within the scope of a building contract the principal contractor is the agent of the owner to subject his property to liens in favor of subcontractors for labor and materials; and a subcontractor who furnishes to the principal contractor materials which are wrought into the building in compliance with the specifications of the contract is entitled to a lien notwithstanding a failure of the principal contractor to complete the building in exact compliance with the contract and without regard to whether the principal contractor may be debarred of a lien by reason of the fact that nothing is owing him upon his contract. *Taylor v. Dall L. & Z. Co.* 348

4. When a payment was about to be made to the principal contractor in accordance with the contract, subcontractors asked the owners to pay the money to them on their bill for materials, but failed to obtain a written order from the principal contractor as suggested by the owner, and took no legal proceedings to intercept the payment to the principal contractor. They had no contract right to intercept it. *Held*, that these facts did not show any waiver of the subcontractors' rights, any estoppel, or any extension of time of payment to the principal contractor. *Ibid.*

5. Sec. 3315, Stats. (1898), requiring a subcontractor furnishing materials to give notice of his claim of lien within sixty days after such materials are furnished, does not require a separate notice for each delivery where all were so connected as to constitute substantially one transaction, and in such a case the furnishing is not deemed complete until the last delivery. *Ibid.*

6. Where the principal contractor for a building orders and receives from a subcontractor material therefor from time to time as the construction progresses, it will be presumed that such purchases have relation to each other and constitute but one transaction for the purposes of the lien statute, although there may be no express agreement in advance that the principal contractor will purchase, or the materialman furnish, all that may be called for in such construction; but where the continuity of such deliveries is broken by long and unusual periods of time, a presumption against the unity of the transaction arises, unless such interruption and severance in time be clearly explained. *Ibid.*

7. Upon the evidence in this case it is *held* that there was but a single furnishing of materials and that notice of the subcontractors' claim for a lien might be given at any time within sixty days after the last delivery. *Ibid.*

Same: Foreclosure: Title acquired by purchaser: Dower.

8. After the entry of judgment of foreclosure of a mortgage of land executed by the owner and his wife, the mortgagee was made a party to an action to foreclose certain mechanics' liens and judgment was entered therein adjudging that said liens were prior to all other claims, that the premises be sold to satisfy said liens, and that on sale the rights of all parties, including the mortgagor and mortgagee, be barred and foreclosed. Thereafter at the sale on foreclosure of the mortgage the premises were purchased by the mortgagee, and afterwards they were sold under the judgment of foreclosure of the mechanics' liens. *Held*, that under the sale on foreclosure of the mortgage the mortgagee acquired the interest of the mortgagor discharged of all inchoate right of dower in the mortgagor's wife, and that such inchoate right of dower was not revived by the foreclosure of the mechanics' liens, but, under secs. 3321, 3324, 3326, Stats. (1898), passed to the purchaser at the mechanic's lien sale. *Connecticut Mut. L. Ins. Co. v. Goldsmith*, 116

9. Privity between the mortgagee and the purchaser at the mechanic's lien sale was established by the statutes mentioned. *Ibid.*

Same: Logs and lumber: Hauling: "Timber."

10. Sec. 3329, Stats. (1898), does not give a lien for the amount due for labor or services in hauling manufactured lumber from the mill to market. *McGeorge v. Stanton-DeLong L. Co.* 7

[11. Whether larger timbers, other than boards and planks, manufactured from the logs, should be classed as "timber" for the hauling of which a lien is given, not determined.] *Ibid.*

LIFE ESTATES. See PARTITION. SUBROGATION, 2.

LIFE INSURANCE. See INSURANCE, 1, 2.

LIGHTNING RODS: Notes given for. See BILLS AND NOTES, 5.

LIMITATION OF ACTIONS.

See CONSTITUTIONAL LAW, 11. MASTER AND SERVANT, 5-8. SUBROGATION, 3. TAX TITLES, 8, 10, 13.

1. The municipal court for Langlade county, created by ch. 96, Laws of 1891, is not a justice's court nor a court of record, but is a municipal court under sec. 2, art. VII, Const.; and an action upon its judgment is barred, under subd. 1, sec. 4222, Stats. (1898), after six years from the rendition thereof. *J. C. Lewis Co. v. Adamski*, 311

2. Where a transcript of a judgment of said municipal court has been filed and docketed with the clerk of the circuit court as authorized by said act of 1891, an action upon the judgment so docketed is, by secs. 2900, 2902, Stats. (1898), barred after ten years from the date of its rendition. *Ibid.*

3. In an action upon a judgment of the municipal court for Langlade county the answer alleged the date of the rendition of the judgment and the date of the filing of a transcript with the clerk of the circuit court. It also alleged that more than ten years had elapsed between the entering of said judgment and the commencement of the action thereon. It then alleged that

the action was barred by subd. 1, sec. 4222, Stats. (1898). *Held*, that defendant was entitled to rely upon the ten-year limitation under secs. 2900, 2902. *Ibid.*

4. Payment of interest upon a past-due note secured by mortgage extends the time within which, under sec. 4220, Stats. (1898), an action may be brought to foreclose the mortgage to twenty years from the date of such payment. *Hughes v. Thomas*, 315

LIQUORS. See INTOXICATING LIQUORS.

LOCAL SELF-GOVERNMENT. See CONSTITUTIONAL LAW, 8, 9.

LOGS AND LUMBER. See LIENS, 10, 11.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution if the facts are undisputed the question whether there was probable cause for the prosecution is a question of law for the court. *King v. Apple River Power Co.* 575

2. If after a full, fair, and honest statement to a reputable attorney of all the facts and information within his knowledge a person takes the advice of such attorney in making a criminal complaint, honestly believing the one charged to be guilty, he has probable cause, as a matter of law, for his action. *Ibid.*

3. The term "full and fair statement of all the facts" does not mean all the facts discoverable; nor is it necessary that diligence in making inquiries be shown. *Ibid.*

MANDAMUS.

See JUDGMENT, 6.

1. Where a city in which the schools have been conducted under the district system as provided in the general statutes adopts that part of the general city charter law which is applicable to schools, and a board of education is appointed accordingly, *mandamus* on the relation of the city is the proper remedy to compel the district officers to turn over the school property in their possession to the new board of education. *State ex rel. Manitowoc v. Green*, 324

2. In such proceeding by *mandamus*, commenced more than three months after the attempted and assumed adoption of the general charter provisions, the defendants are precluded by ch. 165, Laws of 1899, from calling in question the validity of such assumed adoption. *Ibid.*

MANSLAUGHTER. See HOMICIDE.

MARRIED WOMEN. See BILLS AND NOTES, 2. CORPORATIONS, 1. HUSBAND AND WIFE.

MASTER AND SERVANT.

Creation and existence of the relation: Evidence.

1. Evidence tending to show that plaintiff when injured was at work in one of the departments of defendant's factory, the working place and the necessary machinery and appliances being furnished by defendant; that he was paid by the piece, but that defendant hired the men who assisted him, and paid them

out of his earnings; and that plaintiff and the men were subject to the supervision and direction of defendant's superintendent, and were in fact in some cases directed in their work by him, is *held* sufficient to sustain a verdict to the effect that the relation of employer and employee existed. *Walker v. Simmons Mfg. Co.* 542

Same: Contract construed: Compensation, etc. See EVIDENCE, 2–6. PRINCIPAL AND AGENT, 1.

2. Defendant's testator, one P., having a stock of dry goods worth about $10,000, proposed to plaintiff that if the latter would go with him to another city where he intended to establish a dry goods business, and would remain with him until he should be able to draw from the concern $10,000, besides "keeping the stock up" and paying expenses, he would pay plaintiff $15 per week, and when he should be able to draw from the business as aforesaid he would give plaintiff a one-fourth interest in the store, this being intended as additional pay, and plaintiff being expected to use his best endeavor to "make the store the greatest success possible." Plaintiff at once commenced, and until P.'s death continued, to comply on his part with the terms of the proposal. *Held*, sufficient to show that plaintiff accepted the proposal as a whole and not merely as to the weekly compensation. *Ott v. Boring*, 472

3. No partnership *in præsenti* was created by such proposal and its acceptance. *Ibid.*

4. By the phrase "keeping the stock up," in the contract, was meant the maintenance of such a volume and variety of merchandise as would best promote the ultimate purpose of making the store the greatest success possible. *Ibid.*

5. Not until P., in the exercise of honest and reasonable judgment, deemed that he was able to draw $10,000 from the concern, consistently with keeping the most advisable volume of business, would plaintiff have the right, under the contract, to demand the transfer of a one-fourth interest. *Ibid.*

6. The fact that for about seventeen years after the making of the contract, and until his death, P. refrained from drawing the $10,000, and kept it in the business to enable the advancement and increase thereof, shows conclusively, as against him and his personal representatives, that the time did not come during his life when he was able to withdraw said sum and "keep the stock up," in the contractual sense of those words; hence that no cause of action upon the contract or for breach of it arose in his lifetime, against which any statute of limitation ran. *Ibid.*

7. Until a demand by the plaintiff and refusal by P. to perform the contract according to its terms, or until repudiation of the agreement by P., no cause of action at law for money could accrue to the plaintiff; and the statute of limitations would not begin to run until the cause of action had accrued. *Ibid.*

8. Plaintiff's failure to demand transfer to him of a one-fourth interest in the business during P.'s lifetime,—he having no reason to suppose that P. was acting otherwise than in good faith in continuing to postpone the time for withdrawal of the $10,000,—did not, under all the circumstances, constitute laches on the part of the plaintiff, precluding his recovery of the value of said interest after P.'s death. *Ibid.*

Liens for labor. See LIENS, 1, 10, 11.

Bond of employee. See PRINCIPAL AND SURETY.

Injuries to servants: Unsafe working place or appliances.

9. One who furnishes to another a working place, machinery, and appliances with which to do his work owes to the latter the duty of furnishing him with a reasonably safe place in which to do his work. *Walker v. Simmons Mfg. Co.* 542

10. In an action for injuries to an employee caused by an unguarded set-screw projecting from a revolving shaft in defendant's factory, the evidence is *held* to sustain findings in the special verdict to the effect that plaintiff at the time of the accident was working at a place in which he was authorized by defendant to do his work; that the unguarded set-screw was so located as to be dangerous to plaintiff at his work in that place; and that plaintiff did not assume the risk and was not guilty of contributory negligence. *Ibid.*

11. The set-screw being so located as to be dangerous to employees while doing their work, it was the duty of defendant, under sec. 1636*j*, Stats. (1898), to securely guard it. *Ibid.*

12. In submitting for special verdict the question whether the working place furnished by defendant was a reasonably safe one, the jury were instructed that if the shafting in that place was "so located as to be dangerous to plaintiff in the discharge of his duties in the line of his employment at the time of the injury" they should answer the question "No." *Held*, that a further statement of what the law required in respect to guarding dangerous shafting did not render the instruction prejudicially erroneous as informing the jury of the effect of their finding; and, it being undisputed that the shafting was not guarded at any time, the jury could not have been misled. *Ibid.*

13. The words, in such instruction, "in the line of his employment at the time of his injury" could not have misled the jury, but must have been understood as having reference to the performance of his ordinary duties under his employment. *Ibid.*

14. Failure in the charge to distinguish between furnishing a safe place originally and thereafter exercising ordinary care to keep it reasonably safe, and failure to submit in the special verdict the question whether defendant originally furnished a safe place and thereafter used ordinary care in maintaining it, cannot be complained of by appellant where a proposed question on that subject was excluded from the verdict upon his objection and insistence that it was not a material fact to be submitted to the jury. *Ibid.*

15. In an action for injuries to an employee caused by the catching of a bed spring which he was handling upon a projecting and unguarded set-screw upon a line of overhead shafting in defendant's factory, the insufficiency of light, if there was such, at the time and place in question was a fact properly to be considered by the jury in determining whether plaintiff assumed the risk, but alone was not sufficient to charge him with assumption of unknown dangers. *Ibid.*

16. The duty of an employer in respect to furnishing to his employee a reasonably safe place to work in or reasonably safe appliances to work with is not discharged if the place or appliance furnished is obviously dangerous although it is such as is in gen-

eral use among employers of ordinary caution and prudence in the same line of business under the same circumstances. *Yasdzewski v. Barker*, 494

17. The word "obviously," as used above, does not mean that the danger should be obvious to any person, however unskilled or ignorant, but that it should be obvious to the ordinarily careful employer or to a person possessing equal skill and judgment and opportunity for examination. *Ibid.*

18. An instruction to the effect that the machine in question was reasonably safe if such machines were in general use in the same business, unless the jury should find that such machines were not reasonably safe, was erroneous. *Ibid.*

19. In an action for personal injuries caused by a splinter broken from a die in a punch press which plaintiff was operating for defendant, the question whether the die produced in court by plaintiff was the one from which the splinter came is *held*, upon the evidence, to have been for the jury. *Hocking v. Windsor S. Co.* 532

Same: Negligence or incompetence of fellow-servants: Promise to remove danger: Assumption of risk. See RAILROADS, 10.

20. In an action for personal injury alleged to have been caused by incompetence of a common laborer, plaintiff's fellow-servant, a complaint showing that plaintiff had continued in defendant's service, exposed to the known risk from such incompetence, for ten days after the defendant had promised to replace the laborer by a competent person, does not necessarily show that such time was so unreasonably long for the substitution of another laborer that plaintiff must be deemed to have assumed the risk. Facts to show that the time was not unreasonable might be given in evidence, though not pleaded. *Williams v. Kimberly & Clark Co.* 303

21. An allegation that defendant negligently continued the laborer in the service after the promise to remove him should not be construed as showing that the ten days was an unreasonable time, since a master's failure to remove an incompetent employee at once is negligence in the sense, at least, of being conduct subjecting him to liability to other employees. *Ibid.*

22. The rule justifying an employee in temporary exposure to known risk upon the employer's promise to remove the danger applies to risks arising from the incompetence of fellow-servants as well as to those from dangerous machinery; and no distinction is made between fellow-servants using complicated and dangerous machinery and those using simple tools and implements or none at all. *Ibid.*

[23. Whether a promise to repair is any less effective to relieve a workman from assumption of risk from a simple tool than in case of complicated ones, not decided.] *Ibid.*

24. Facts alleged in the complaint in this case as to the incompetence of plaintiff's fellow-servant and his negligence in throwing blocks of wood into a rack from which plaintiff took them to put them into a barking machine, are *held* not to show that the risk of being struck and injured by blocks so thrown was so obvious, imminent, momentary, constant, and unavoidable that no reasonably prudent person would expose himself to it even temporarily; and on demurrer, therefore, the case cannot

be held to be within the exception to the rule justifying plaintiff in remaining at work for a reasonable time in reliance upon the employer's promise to remove the incompetent fellow-servant. *Ibid.*

Same: Contributory negligence. See RAILROADS, 11-15.

Same: Minor servants: Contributory negligence.

25. Plaintiff, a boy fifteen years old, substantially a man grown, and intelligent for his years, was injured by the revolving knives of a planing machine in defendants' mill while attempting to clean out a hopper under the knives. Instructions given as to his comprehension and assumption of the risk are *held* to have been correct. *Horn v. La Crosse Box Co.* 384

26. A finding that plaintiff was guilty of contributory negligence was not inconsistent with a finding that when he attempted to clean out the hopper he did not know of the revolving knives which were liable to come in contact with his hand. Taken together, such findings indicate that the jury decided that, under the circumstances, plaintiff ought to have known and comprehended the danger. *Ibid.*

MAXIMS.
De minimis non curat lex, 243, 249.
Expressio unius est exclusio alterius, 572.
In pari delicto, etc., 567.
Noscitur a sociis, 509, 513.
Omnia rite esse acta præsumuntur, 460.
Res judicata proveritate accipitur, 388, 574.
Stare decisis, 83, 84, 459.

MECHANICS' LIENS. See LIENS, 2-9.

MEDICAL EXPERTS. See PHYSICIANS AND SURGEONS.

MEETINGS. See SCHOOLS.

MERCY: Recommendation by jury. See CRIMINAL LAW, 21.

MILWAUKEE: Applicability of general statutes. See INTOXICATING LIQUORS. MUNICIPAL CORPORATIONS, 2.

MINORS. See MASTER AND SERVANT, 25, 26. WILLS, 1, 2.

MISTAKES. See APPEAL, 26. TRIAL, 10.

MORTGAGES.

Validity: Mortgage by wife of separate property to secure husband's debt. See HUSBAND AND WIFE, 1.

Recording acts: Improper discharge of prior mortgage by record owner after assignment.

1. A person who deals with land by taking a mortgage or deed thereof is protected by the recording act as to a prior mortgage on the property which has been improperly discharged by the record owner, but not the real owner, of the security, such person not having notice of the assignment of such prior mortgage. *Bautz v. Adams,* 152

Same: Payment to record owner after assignment: Agency: Evidence.

2. A debtor upon commercial paper whose obligation is secured by a mortgage on real estate owned by him is not protected by the recording act in paying the mortgage indebtedness to the record, but not the real, owner of the mortgage and taking a release thereof, such record owner not having possession of the

security nor actual authority from the real owner to act as the latter's agent in the transaction. *Ibid.*

3. Agency to receive payment of money due upon commercial paper secured by mortgage or otherwise can only be implied from possession, by the one assuming to have authority in the matter, of the securities and capacity to deliver the same upon payment being made. *Ibid.*

4. Actual authority of a person, not the owner or possessor of a note and mortgage, to receive payment of the indebtedness is essential, in order for such payment to extinguish the security. *Ibid.*

5. The actual authority above mentioned need not be expressed in writing or established by direct evidence. It may be established by circumstances showing with reasonable certainty its existence. *Ibid.*

Advances to pay off mortgage: Defective new mortgage: Subrogation. See SUBROGATION, 1–3.

Partial payment: Extension of time for foreclosure. See LIMITATION OF ACTIONS, 4.

Foreclosure by action: Parties: Other claimants.

6. In an action to foreclose a mortgage it was alleged that certain defendants claimed to have some interest in or lien upon the premises and to be the owners of the note and mortgage and had made such claim to the defendants personally liable to pay the note, by reason whereof the latter had refused to pay the note to plaintiff; but that such claimants had in fact no interest in the note and mortgage or the premises. Judgment was demanded, among other things, adjudging plaintiff to be the sole owner of the note and mortgage. *Held*, on demurrer, that under sec. 2603, Stats. (1898), such claimants were properly made parties defendant. *Doherty v. Doherty*, 375

Same: Judgment declaring mortgage void: Conclusiveness. See JUDGMENT, 5.

Same: Sale: Subsequent sale under prior lien. See LIENS, 8, 9.

Condemnation of right of way over mortgaged land. See RAILROADS, 1–3.

MOTIONS, in supreme court, for rehearing, etc. See APPEAL, 27.

MUNICIPAL CORPORATIONS.

Adoption of general charter provisions as to schools. See MANDAMUS.

Same as to improvements: Reassessment.

1. In sec. 1210*d*, Stats. (Supp. 1906; Laws of 1901, ch. 9)—providing that in all cases where the invalidity of a special assessment for improvements in any city is caused by reason of the work having been done "without authority of law *or* by the failure of the common council to pass a valid ordinance adopting" any part or parts of ch. 40*a*, Stats. (1898), no new assessment shall be made until after the due passage of an ordinance adopting the essential provisions of said chapter relating to city improvements,—the word *or* should be construed as if it were *and;* and the adoption of any part of ch. 40*a* is prerequisite to a reassessment only when the original lack of authority was by reason of a failure to adopt such provisions. *Dahlman v. Milwaukee*, 427

2. So construed the section is applicable to all cities in the state, including Milwaukee. *Ibid.*

Grading of streets: Invalid assessment: Reassessment.

3. The substitution (by ch. 354, Laws of 1903) of a remedy by reassessment in place of an action for damages for the grading of a street where such grading is illegal merely because the previous assessment of benefits and damages was invalid, was within the power of the legislature. No vested right was thereby taken away, since there is no constitutional or common-law right to recover damages for the authorized grading of a street by a city when there is no negligence in the act; and it was competent for the legislature to provide that a valid assessment should no longer be a condition precedent to the legality of the grading. *Ibid.*

Same: Taking of land by removal of lateral support.

4. Where a substantial part of an adjoining owner's land falls into the street by reason of the removal of its lateral support in the course of grading there is a taking of the soil for public purposes, for which the owner is entitled to recover at least nominal damages. An assessment, in the grading proceedings, of the benefits and damages accruing from the work does not cover such a taking. *Ibid.*

Liquor licenses: General laws applicable to Milwaukee. See INTOXICATING LIQUORS.

Injuries from defective sidewalk: Notice of defect. See TRIAL, 4.

5. In an action against a village for injuries from a broken plank in a sidewalk, it being found in a special verdict that the street commissioner had actual notice of the defect long enough to have enabled the defendant, in the exercise of ordinary care, to repair it before the accident, and there being no dispute that the commissioner had such notice at least five days prior to the accident, it was not error to refuse to submit a question in the special verdict as to when the plank which caused the injury was broken. *Bereiter v. Abbotsford,* 28

MUNICIPAL COURTS. See LIMITATION OF ACTIONS, 1-3.

MURDER. See HOMICIDE.

NEGLIGENCE.

See ANIMALS. APPEAL, 18. MASTER AND SERVANT, 9-26. PRINCIPAL AND AGENT, 3. RAILROADS, 4-15. TRIAL, 8, 15, 17, 18.

What one knows regarding a condition liable to affect his personal safety he is presumed to remember, but even slight circumstances may be sufficient to carry to the jury the question whether momentary forgetfulness in a given case was negligence. *Wolf v. C. & N. W. R. Co.* 335

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEWSPAPERS: Publication of tax notices. See TAX TITLES, 15.

NEW TRIAL.

See APPEAL, 8. CONTINUANCE. CRIMINAL LAW, 21.

1. A new trial should not be granted because of newly-discovered evidence unless there is substantial ground for believing that such evidence may probably change the result. *Anderson v. Arpin H. L. Co.* 34

2. Newly-discovered evidence upon a particular point is not cumulative to the evidence upon that point introduced at the trial, if it is of a different kind. *Ibid.*

3. A verdict in a civil action should not be set aside because of improper conduct of jurors not occasioned by the prevailing party or any one in his behalf, where the court cannot see that it had or might have had an effect unfavorable to the losing party. So *held* as to a quarrel leading to blows between two jurors in the jury room, it not appearing that such quarrel had any tendency to coerce any juror to agree to the verdict. *Logeman Bros. Co. v. R. J. Preuss Co.* 122

NOMINAL DAMAGES. See DAMAGES, 1. MUNICIPAL CORPORATIONS, 4.

NOMINATIONS for office. See ELECTIONS, 1–3.

NOTARY PUBLIC. See DEEDS, 1.

NOTICE.
Of placing cause on trial calendar. See CRIMINAL LAW, 7.
Of recorded agreement, to subsequent purchasers of land. See DEEDS, 2.
Of application for special guardian. See GUARDIAN AND WARD, 2.
Of claim for lien. See LIENS, 5–7.
Of assignment of mortgage. See MORTGAGES, 1.
Of defect in sidewalk. See MUNICIPAL CORPORATIONS, 5.
Of special meetings of school district. See SCHOOLS, 2, 3.
Of tax sale: Publication. See TAX TITLES, 6, 7, 15.
Of election to continue contract in force. See VENDOR AND PURCHASER, 3.
Of unrecorded conveyance. See VENDOR AND PURCHASER, 9, 10.

NUISANCE. See RAILROADS, 8.

OATH OF OFFICE: Filing. See COUNTY JUDGE, 1. GRAND JURY, 4.

OFFER AND ACCEPTANCE. See MASTER AND SERVANT, 2.

OFFICERS.

Nomination and election. See ELECTIONS.

Election of "county officers." See CONSTITUTIONAL LAW, 3, 4.

Continuance in office by legislative act. See COUNTY JUDGE, 3.

The continuance of a person in office by legislative interference, beyond the specific term for which he was elected or appointed, is equivalent to a new appointment to the office, and void if the office be one that the legislature cannot fill by direct appointment or election. *State ex rel. Dithmar v. Bunnell,* 198

Oath of office and bond: Filing. See COUNTY JUDGE, 1, 2.

Offices created by legislature: Eligibility and qualification. See CONSTITUTIONAL LAW, 5–7.

Same: Interference with local self-government. See CONSTITUTIONAL LAW, 8, 9.

Term of office: Vacancies, etc. See COUNTY JUDGE, 1–3.

Taking forcible possession of office room. See COUNTY JUDGE, 4.

Deeds by officers: Title conveyed. See DEEDS, 4.

Contracts by officers: Public policy. See CONTRACTS, 7.

Clerk of supreme court: Duties. See APPEAL, 25.

Chairman of county board. See CONTRACTS, 7.

County clerk. See COUNTIES, 3.

Notary public in another state: Proof of official character. See DEEDS, 1.

Officers of corporations. See CONTRACTS, 7.

OFFICIAL BONDS. See CONSTITUTIONAL LAW, 7. COUNTY JUDGE, 2.

OPINION EVIDENCE. See CRIMINAL LAW, 3, 4. EVIDENCE, 7–10. SALES, 15.

OPTION to purchase land. See VENDOR AND PURCHASER, 8.

ORDERS. See APPEAL, 1.

PARENT AND CHILD. See DAMAGES, 2–4, 7, 10. TRIAL, 19.

PAROL EVIDENCE. See INSURANCE, 4.

PARTIES.
By whom action may be maintained. See COVENANTS, 3, 8. QUO WARRANTO.
Joinder. See MORTGAGES, 6. PARTITION, 1. SUBROGATION, 7.
Upon whom judgment conclusive. See JUDGMENT, 1–4.

PARTITION OF LAND.

1. Under sec. 3101, Stats. (1898), a tenant in common of a life estate in land may maintain an action for partition thereof; and under sec. 3102 the owners of the reversion are proper parties to such action. *Plano Mfg. Co. v. Kindschi,* 590
2. Under our statutes relating to partition of land a cotenant of a life estate can have partition of that estate only and not of the fee or reversion. *Ibid.*
3. The test as to whether a partition of lands in kind would result in "great prejudice to the owners," within the meaning of sec. 3119, Stats. (1898), is whether the value of the share of each would be materially less than his share of the money which could probably be obtained on a sale of the whole. *Idema v. Comstock,* 16
4. The finding of a referee that partition in kind of two forty-acre tracts of timber land between two persons, one owning a two-thirds and the other a one-third interest, could not be made without great prejudice to the owners, is *held* not to be against the clear preponderance of the evidence. *Ibid.*

PARTNERSHIP. See MASTER AND SERVANT, 3. SUBROGATION, 5–7.

PATENTS.

In an action to revoke and annul a license by which plaintiff gave to the defendant corporation the exclusive right to make and sell a patented device, the facts (showing, among other things, that, although defendant had not been successful in making and selling the machines covered by the invention, yet it had acted with reasonable diligence and had complied in all respects with the terms of the license agreement) are *held* not to entitle plaintiff to any relief. *Sullivan v. Compressed Air R. & S. Mfg. Co.* 134

PAYMENT. See EVIDENCE, 6. FRAUD. LIMITATION OF ACTIONS, 4. MORTGAGES, 2–5. PLEADING, 2. VENDOR AND PURCHASER, 2–7.

PHYSICIANS AND SURGEONS.

See CRIMINAL LAW, 4.

Sec. 1436, Stats. (Supp. 1906; Laws of 1903, ch. 426), does not preclude a physician who holds neither the license nor the certificate of registration there referred to from testifying to facts not within the field of an expert but within the observation of any person. So *held* as to testimony of a physician that he found plaintiff's eye had been injured by some object; that he washed the eye, sent plaintiff to the hospital, and there removed a metal splinter from the eye with a magnet; and that he afterwards removed the eye. *Hocking v. Windsor S. Co.* 532

PLACE OF TRIAL. See VENUE.

PLEADING.

Complaint: Construction: Sufficiency. See CONTRACTS, 12. CORPORATIONS, 2. DAMAGES, 2. MASTER AND SERVANT, 20, 21, 24. SUBROGATION, 6.

1. If the language of a complaint will reasonably admit of a construction that will support it, that construction should be adopted rather than one that will condemn it; and to that end all facts reasonably inferable from facts expressly alleged are to be deemed to be set forth and as forming part of the pleading. *Travelers Ins. Co. v. Hallauer,* 371

2. A complaint alleged in substance that defendant wished to appeal from a judgment against him for about $7,000; that the plaintiff company, which had insured him against liability on such judgment in the sum of $5,000, procured from a surety company an undertaking on appeal to pay the judgment; and that defendant agreed in writing that if the judgment should be affirmed he would pay to plaintiff any amount which the latter might be obliged to pay in excess of $5,000. The complaint then averred that plaintiff was obliged to and did pay said judgment, including a certain amount in excess of $5,000. *Held,* on demurrer, that the latter averment did not state a mere conclusion of law, and that it included, by reasonable inference, an averment that the judgment was affirmed on the appeal, so that the payment was not voluntary. *Ibid.*

Same: Action, tort or contract? See ACTION.

Cross-complaint: Demand of affirmative relief: Who may demur.

3. A cross-complaint under sec. 2656*a*, Stats. (1898), by all the defendants except one L., praying, among other things, that if plaintiff have judgment it be provided therein that execution be issued first against said L. and not against the other defendants until the remedy against L. be exhausted, demands affirmative relief against the plaintiff. *First Nat. Bank v. Omro,* 416

4. Even though a cross-complaint does not demand affirmative relief against the plaintiff he may demur thereto, under sec. 2658, Stats. (1898). The clause in sec. 2656*a* providing that the party against whom affirmative relief is demanded may demur was intended to make it certain that a codefendant affected by the relief sought should have that right, which is not elsewhere given. *Ibid.*

5. In an action upon a promissory note, facts showing that as between the defendants one of them should pay the note and that in case the judgment cannot be collected from him the others should be subrogated to the plaintiff's right are sufficient for a cross-complaint. *Ibid.*

Answer: Construction, etc. See BILLS AND NOTES, 6. LIMITATION OF ACTIONS, 3.

Counterclaim. See CONTRACTS, 12. VENDOR AND PURCHASER, 5.

Demurrer. See CORPORATIONS, 2. MASTER AND SERVANT, 20, 21, 24. PLEADING, 2, 4.

Amendment of pleading. See APPEAL, 23.

6. Refusal to permit an answer to be amended so as to set up new defenses is *held* not an abuse of discretion where no excuse was given for delay in making the application. *Brillion L. Co. v. Barnard,* 284

Variance. See PRINCIPAL AND SURETY, 5.

POSSESSION.
Of land. See EJECTMENT. MANDAMUS. TAX TITLES, 10–13.
Of personal property. See EXECUTORS. GIFTS. MANDAMUS.
Of note and mortgage: Agency to receive payment. See MORTGAGES, 2–4.

PRACTICE. See ACTION. APPEAL AND ERROR. CERTIORARI. COSTS. COURTS. CRIMINAL LAW AND PRACTICE. DAMAGES. EJECTMENT, 2, 3. EVIDENCE. GRAND JURY. JUDGMENT. JURY. JUSTICES' COURTS. MORTGAGES, 6. NEW TRIAL. PARTITION. PLEADING. QUO WARRANTO. RAILROADS, 1. REFERENCE. TRIAL. VENUE. WITNESSES.

PREJUDICE of judge. See VENUE, 5, 6.

PRESUMPTIONS. See ANIMALS, 1, 2. APPEAL, 5–7, 11. CRIMINAL LAW, 13. NEGLIGENCE. PRINCIPAL AND SURETY, 3, 4. REFERENCE, 1. SCHOOLS, 1. TAX TITLES, 5, 15. VENDOR AND PURCHASER, 1.

PRINCIPAL AND AGENT.

Oral authority to purchase property. See FRAUDS, STATUTE OF.

Agency of principal contractor for owner. See LIENS, 3.

Agency to receive payment on note and mortgage. See MORTGAGES, 2–5.

Continuance of employment after dismissal: Compensation.

1. Evidence tending to show, among other things, employment of plaintiff, or continuation of his employment, for a week after his formal dismissal as agent of defendant, is *held* sufficient to sustain a recovery of salary for that week. *McKone v. Metropolitan L. Ins. Co.* 243

Commissions on sale of land. See BROKERS.

Guaranty against losses through subagents. See CONTRACTS, 2.

2. Contracts under which plaintiff became a district superintendent of the defendant life insurance company are construed to be contracts of employment and not to make plaintiff a guarantor of the defendant against losses in the district from the frauds or defalcations of an assistant superintendent in a detached section of such district with whose nomination or ap-

pointment plaintiff had nothing to do and who, in the matter of reports and remittances, dealt directly with the defendant. *McKone v. Metropolitan L. Ins. Co.* 243

Negligence or omission of duty: Liability of agent.

3. Requested instructions as to the liability of an agent to his principal for negligence or omission of duty are *held* to have been fairly covered by an instruction that the agent was bound to exercise reasonable diligence and such skill as is ordinarily possessed by persons of common capacity engaged in the same business or occupation, and that it was for the jury to determine whether or not, in the particular case, the agent failed to exercise such diligence and such skill. *Ibid.*

Deeds executed in official or representative capacity: Effect. See DEEDS, 4.

Fraud of agent in procuring contract. See CONTRACTS, 9–11.

PRINCIPAL AND SURETY.

Wife as surety for husband. See HUSBAND AND WIFE, 1.

Guaranty against losses through subagent. See PRINCIPAL AND AGENT, 2.

Bond for conduct of employee: Fraud: When bond takes effect: Pleading: Evidence.

1. If the proposed surety in a bond for the conduct of an employee makes inquiry of the proposed obligee as to the previous conduct of the employee, such obligee is bound to make full disclosure of all material facts within his knowledge bearing on the risk, and if he fails to do so or knowingly makes, in response to the inquiry, false representations as to such facts, or does so ignorantly but under such circumstances as would naturally lead the inquirer to believe the representations to be based on an investigation, and the proposed surety is thereby induced to sign the bond, he may avoid liability thereon on the ground of fraud. *Brillion L. Co. v. Barnard,* 284
2. But an innocent false representation in such a case, such as the assertion of a mere opinion or the misstatement of a fact through mere ordinary negligence, not made under such circumstances as to suggest that it was based on an investigation, will not relieve the surety of liability. *Ibid.*
3. In general a bond speaks from its date, but upon proof that it was delivered at a later time the primary presumption is displaced by one that it was intended to take effect from its delivery only, unless by its terms it satisfactorily appears that the parties intended it to take effect from its date or some other time. *Ibid.*
4. A bond given to secure faithful performance by an employee of his duties under a contract of employment dated February 11, bore the same date, but was not delivered till May 6. When first presented for signature the bond provided that it should "expire with the time of service as specified in the contract" (which time was not fixed but depended on mutual satisfaction of the parties), but before being signed it was changed so as to provide that it should "expire one year from the date hereof." *Held,* that the bond took effect as of the date of the contract and covered defalcations, if any, between such date and its delivery. *Ibid.*

5. In an action by an employer upon the bond of an employee, the surety must specially plead, in order to avail himself of, the defense of a release by reason of the employer having made a contract with the employee permitting the latter to repay the money misappropriated by working a sufficient length of time to balance the same with his wages, or by reason of the imposition upon the employee of duties not contemplated by the contract and materially increasing the risk of the surety, or by reason of the employer having prejudicially retained the employee in the service after discovering his delinquency, concealing the situation from the surety. *Ibid.*

6. In an action upon the bond of an employee the books kept by him as a part of his duties during the period of service covered by the bond are evidence against the surety, but not so as to unverified invoices and books kept by the employee before said period. *Ibid.*

7. Thus, an inventory of stock on hand a month and a half before the commencement of the term of service covered by the bond, together with unverified invoices and a sales book kept by the employee, do not, as against a surety on the bond, show the amount of stock on hand when said term of service began. *Ibid.*

PRIVITY. See JUDGMENT, 2, 3. LIENS, 9.

PROBABLE CAUSE. See MALICIOUS PROSECUTION.

PROMISSORY NOTES. See BILLS AND NOTES.

PUBLICATION of notice of tax sale. See TAX TITLES, 6, 7, 15.

PUBLIC POLICY. See CONTRACTS, 3–7.

PUBLIC SCHOOLS. See SCHOOLS.

QUIETING TITLE. See TAX TITLES, 3.

QUITCLAIM DEED. See DEEDS, 4. VENDOR AND PURCHASER, 9.

QUO WARRANTO.

1. Under sec. 3466, Stats. (1898), providing that an action of *quo warranto* may be brought in the name of the state by a private person on his own complaint when the attorney general refuses to act or when the office usurped pertains to a county, etc., the person bringing the action must have some interest in ending the claimed usurpation, but it is sufficient that he be a taxpayer of the district affected. *State ex rel. Williams v. Samuelson,* 499

2. The office of county supervisor of assessment, created by ch. 445, Laws of 1901, is an office which "pertains to a county," within the meaning of said sec. 3466. *Ibid.*

3. The fact that in an action brought in the name of the state by a private person under sec. 3466, Stats. (1898), the attorney general appears and continues as one of the attorneys for the defendant sufficiently shows that an application to him to commence the action would have been futile, and is equivalent to a refusal by him to act in the matter on behalf of the state. *Ibid.*

RAILROADS.

Condemnation of land: Agreement with owner: Rights of mortgagee.

1. Upon condemnation of a right of way for a railroad over mortgaged land the mortgage security is not to be impaired or di-

minished, and there must be a single award covering the entire injury to the estate, including both the value of the strip taken and the diminution, by reason of such taking, in the value of the land not taken. *Stamnes v. Milwaukee & S. L. R. Co.* 85

2. An agreement by the owner of the land, made after the condemnation proceedings were begun, to convey the right of way and release all claims for damages in consideration of a certain sum was not admissible in evidence in order to bar an award of a greater sum. Such an admission as to value could not, in the condemnation proceeding, affect the right of the owner without also affecting the right of the mortgagee, and, not being admissible against the latter, it was not admissible at all. *Ibid.*

[3. Whether by going on with the condemnation proceedings after obtaining such agreement the railway company waived its rights thereunder as against the owner, and whether upon being compelled to pay an award greater than the sum named in the agreement the company would have any remedy as against the owner or the land, not determined.] *Ibid.*

Negligence: Injury to passenger alighting before reaching station.

4. Plaintiff's intestate was fatally injured by stepping from defendant's train on a dark, rainy night and falling through a trestle, the train having stopped, as was customary, at a railway crossing a short distance before reaching the station. The usual street lights were not burning. The evidence showed or tended to show, among other things, that the brakeman had called the station and passed forward without giving any warning that the first stop would be at the crossing; and that deceased was familiar with local conditions and with the custom to stop the train at the crossing. There was no evidence of any custom to call the station before such stop. *Held*, that the question of defendant's negligence was one for the jury. *Wolf v. C. & N. W. R. Co.* 335

5. To establish negligence on the part of defendant in such case it was not essential to prove that, as alleged in the complaint, the brakeman left the car door open after announcing the station. *Ibid.*

6. Notwithstanding the deceased was familiar with local conditions and might have known that the first stop was at the crossing, the circumstances are *held* sufficient to make it a question for the jury whether he was guilty of contributory negligence in acting, through momentary forgetfulness, upon the supposition that the station had been reached. *Ibid.*

7. Under the circumstances mentioned, and in view of the fact that the customary stop of a train at a small station is often very short and passengers are expected to leave the train promptly, it was not negligence as matter of law for the deceased to step from the train without looking for the customary station lights or observing their absence. *Ibid.*

Injury to travelers on highway.

8. Defendant left its locomotive standing partly within the limits of a highway, unattended and under a full head of steam, for an unnecessary and unreasonable length of time. As plaintiff attempted to drive past it the pop valve suddenly opened and steam escaped with considerable noise, causing his horse to

run away and injure him. The jury found that defendant was negligent in so leaving the engine and that such negligence was the proximate cause of the injury. *Held*, that defendant was liable for the injury. The fright of the horse in such case was not caused by one of the usual noises incident to the ordinary operation of a railway. *Crowley v. C., St. P., M. & O. R. Co.* 122 Wis. 287, distinguished. *Fay v. M., St. P. & S. S. M. R. Co.* 639

9. It is not negligence as matter of law for a person to attempt to drive on a highway across a railway track in front of a locomotive standing still thereon. *Ibid.*

Injury to employee.

10. In an action for the death of a brakeman who was crushed between two freight cars, the evidence is *held* sufficient to sustain a verdict to the effect that the cars were detached and standing still when the deceased went between them, and that the accident was caused by negligence of defendant's other employees in backing one of the cars upon him. *Hayes v. C., M. & St. P. R. Co.* 399

11. An instruction to the effect that deceased was not guilty of contributory negligence preventing a recovery if in performing his work about the train he acted as the great mass of men act under like or similar circumstances, is *held* proper when taken in connection with the whole charge, the idea being clearly conveyed that he must have been doing his work in accordance with instructions and as the great mass of men would act under the same or similar circumstances in view of the duties which he was to perform and the instructions which had been given. *Ibid.*

12. An instruction that, in determining whether the deceased was guilty of contributory negligence, his age, intelligence, and experience as a brakeman were to be taken into account, was proper. *Ibid.*

13. An instruction to the effect that if the jury found that a certain employee gave the back-up signal while deceased was between the cars, which was obeyed and the deceased thereby injured, they might find the defendant negligent, is *held*, in view of the evidence, not to have been prejudicially erroneous. *Ibid.*

14. The whole subject of contributory negligence having been fully and properly covered by the general charge, it was not error to refuse a requested instruction to the effect that if deceased went between the cars while they were still moving and was caught between the couplings as described, as and when the cars stopped, the verdict should be for defendant. *Ibid.*

15. Such instruction was properly refused, also, because there was evidence that deceased went between the cars just as they stopped—that they came to a standstill within a foot, and that thereafter one of them was backed upon him without warning. Under such circumstances he could not be held guilty of contributory negligence as a matter of law. *Ibid.*

RATIFICATION. See WILLS, 2.

REAL-ESTATE AGENTS. See BROKERS.

REAL PROPERTY. See BROKERS. COUNTIES, 3. COVENANTS. DEEDS. EJECTMENT. HUSBAND AND WIFE. LIENS, 2-9. MORTGAGES.

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REASONABLE DOUBT. See CRIMINAL LAW, 12, 13, 15.

REASONABLE TIME. See BROKERS, 5. MASTER AND SERVANT, 20, 21, 24. SALES, 7, 8.

REASSESSMENT of benefits, etc. See MUNICIPAL CORPORATIONS, 1–3.

REBATES of premiums, etc. See INSURANCE, 1, 2.

RECORD.
On appeal: What included in. See APPEAL, 1, 4–6. REFERENCE, 1.
Transmission to trial court, etc. See APPEAL, 24–27. COURTS, 1. CRIMINAL LAW, 6.

RECORD BOOK: Grand jury list, where deposited. See GRAND JURY, 1–3.

RECORDING ACTS. See DEEDS, 2. MORTGAGES, 1, 2. VENDOR AND PURCHASER, 9, 10.

RECORDING official bond. See COUNTY JUDGE, 2.

REFERENCE.

See APPEAL, 9.

1. An order of compulsory reference may be based in part on statements of counsel to which no objection is made; and where such statements are not preserved in the record it will be presumed that the reference was proper. *Brillion L. Co. v. Barnard,* 284

2. To warrant a compulsory reference under sec. 2864, Stats. (1898), on the ground that the examination of a long account will be necessary, the action need not be strictly based on the account or be for an accounting. It is sufficient if there is a long account in the proper sense which is directly involved, so that it must, in the regular course of the trial, necessarily be examined as substantially the basis of the claim for a recovery. *Ibid.*

3. Where it appeared that the trial of an issue of fact required the examination of an account on one side containing more than 500 entries and one on the other side containing nearly 100 entries, a compulsory reference was authorized by sec. 2864, Stats. (1898). *Fowler v. Metzger S. & O. Co.* 633

REFORMATION OF INSTRUMENTS. See JUDGMENT, 5.

REFRESHING MEMORY. See EVIDENCE, 6.

REGISTRY OF DEEDS. See DEEDS, 2. MORTGAGES, 1, 2. VENDOR AND PURCHASER, 9, 10.

REHEARING: Motions. See APPEAL, 27.

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Of dower, etc. See HUSBAND AND WIFE, 2.
Of claim for damages, etc. See RAILROADS, 2.

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REPORTER in circuit court: Reading minutes. See CRIMINAL LAW, 5.

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RESCISSION. See CONTRACTS, 8-16.

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RESTRAINT OF TRADE. See CONTRACTS, 3-6.

RESTRICTIONS on use of land: Equitable servitude. See COVENANTS. DEEDS, 2.

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SALES.

Oral authority to agent to purchase. See FRAUDS, STATUTE OF.

Failure of consideration. See COUNTIES, 1.

Right to withdraw from contract while executory. See CONTRACTS, 8.

Rescission of contract of sale. See CONTRACTS, 14-16.

Warranties: New attachment made for machine.

1. There is no implied warranty of the practicability of connecting an addition or new attachment to a machine not manufactured or delivered by the maker of the attachment, where such practicability is a matter as apparent to the vendee as to said maker. *Logeman Bros. Co. v. R. J. Preuss Co.* 122
2. There is no implied warranty that the addition or attachment will answer the known purpose for which it was designed, where the capacity to do the work intended must be the joint capacity of the new device and the old machine. *Ibid.*
3. There is no implied warranty that a machine or attachment will do the work for which it is intended, where it is made according to a model furnished for that purpose by the vendee. *Ibid.*
4. A question for special verdict, "Did the plaintiff agree to manufacture and attach to defendant's punching press certain attachments which would enable the defendant, with the use of such press when equipped with such attachments, to perform the work required by the defendant?" is *held* to cover the controverted facts claimed to constitute an express warranty, so that a negative answer thereto negatived the existence of any such warranty. *Ibid.*

Same: Selection of goods to meet wants of trade.

5. In a contract for the sale of a stock of drugs and pharmaceutical preparations, a provision that all the stock furnished should "be carefully selected to meet the wants of the physicians and druggists" of the vendee's locality is construed not to be a warranty that the goods should be adapted and suitable to meet such wants, but at most an agreement on the part of the vendor,

if it assumed to select the stock, to exercise due care and good faith in making the selection for the purpose specified; and where such care and good faith are shown, evidence that orders by subsequent purchasers from the vendee called for a small percentage of goods not included in the stock selected by the vendor does not even tend to show a breach of the contract. *Wm. S. Merrell Chemical Co. v. A. Spiegel Co.* 272

Same: Heating apparatus: Guaranteed results: Acceptance, etc.

6. The evidence in this case is *held* to sustain a verdict to the effect that heating apparatus furnished by plaintiff and placed in a school building did not fulfil a guaranty that it would warm the rooms of the building to an average temperature of seventy degrees during the coldest weather and at the same time secure good ventilation, and that plaintiff, upon being notified of the fact, failed to make it do so. *American F. & F. Co. v. Board of Education,* 220

7. Heating apparatus furnished by plaintiff was guaranteed to produce certain results, and the contract provided that if it did not do so plaintiff, upon being notified of the fact, would either make it do so or refund all money paid and remove the apparatus. *Held,* that plaintiff, on being so notified, had the option as to which of the two things it would do, but was bound to do one or the other within a reasonable time. *Ibid.*

8. Where after repeated notifications and repeated attempts, continuing through two winters and covering a period of a year and a half, plaintiff had failed to make the apparatus fulfil the guaranty, it could not reasonably ask a longer time, but became bound to refund the money paid and remove the apparatus from the building. *Ibid.*

9. Where, after due demand and notice made and given at the end of said period, plaintiff had failed to remove the heating apparatus, the subsequent use thereof in the building, in consequence of plaintiff's failure to remove it, did not constitute an acceptance of the apparatus. *Ibid.*

10. There having been no change in the capacity or efficiency of the apparatus after such demand for its removal, evidence as to its operation during the following winter was admissible, the conditions being substantially the same as during the previous winters while plaintiff was trying to make it fulfil the guaranty. *Ibid.*

11. Where plaintiff's contract required it to furnish registers for the corridors of the building, but did not guarantee the warming of corridors to seventy degrees, it was clearly implied that the corridors were to be warmed to some extent, and it was not error to admit testimony as to the heating thereof, the jury being instructed that under the contract they were not to be heated to seventy degrees. *Ibid.*

Same: Future output of mill: Implied warranty of quality.

12. Upon an agreement to sell and deliver a quantity of "No. 2 screenings," to be the future output of the vendor's flour mill for about two months,—such screenings being a by-product resulting incidentally from the manufacture of flour,—there was no implied warranty that the screenings so sold would be of the same quality as those being produced at the time the contract was made. *Listman Mill Co. v. Miller,* 393

13. Upon the evidence in this case the question whether the commodity delivered by the vendor was actually the "No. 2 screenings" from the mill during the period specified, is *held* to have been one for the jury. *Ibid.*

14. As to such question it was proper to admit evidence descriptive of the process established and in operation in the mill, and samples or description of the commodity delivered, to show that such commodity could not have resulted from the process described. *Ibid.*

15. A statement by the vendee, in his testimony describing the goods delivered, that they were not No. 2 screenings, is *held* not so clearly an attempt to give his nonexpert opinion upon the question which the jury were to answer that its admission, not specifically objected to upon that ground, can be said to have been an error warranting reversal. *Ibid.*

SALES FOR TAXES. See TAX TITLES.

SALES OF LAND. See BROKERS. COUNTIES, 3. COVENANTS. DEEDS. LIENS, 8, 9. MORTGAGES, 1. VENDOR AND PURCHASER.

SATISFACTION of mortgage. See MORTGAGES, 1, 2.

SCHOOLS AND SCHOOL DISTRICTS.

Meetings of school board: Presumptions as to regularity.

1. Where the minutes of meetings of a school board affirmatively show that they were called and held pursuant to and as required by a rule of the board, and there is no evidence to the contrary, the presumption that they were so called and held is conclusive. *American F. & F. Co. v. Board,* 220

School district meetings: Sufficiency of notice, etc.

2. Notice of a special meeting of a school district, stating merely that it would be held at the schoolhouse in said district, was insufficient where there were two schoolhouses in the district. *State ex rel. Manitowoc v. Green,* 324

3. Notice of a special meeting of a school district in a city, stating that the purpose of the meeting was to determine whether or not the district wished to ratify the adoption by the city of the provisions of the general charter law relating to schools, was not sufficient to authorize an election at such meeting to change the district system for schools to the city system under the general charter law. *Ibid.*

Change from district to city system: Possession of school property: Compelling delivery. See MANDAMUS.

Heating apparatus: Failure to fulfil guaranty. See SALES, 6–11.

Contract for attendance at business college: Fraud. See CONTRACTS, 9–11.

SERVITUDES. See COVENANTS. DEEDS, 2.

SHAFTING: Duty to guard. See MASTER AND SERVANT, 11.

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STATUTES.

Constitutionality. See BILLS AND NOTES, 3. CONSTITUTIONAL LAW. COUNTY JUDGE, 3. GUARDIAN AND WARD, 2. MUNICIPAL CORPORATIONS, 3. OFFICERS.

1. One part of a statute may be unconstitutional and the remainder may still have effect, provided that the two parts are distinct and separable and not dependent upon each other. *Quiggle v. Herman,* 379

Construction. See APPEAL, 25. BILLS AND NOTES, 1, 4, 5. CONSTITUTIONAL LAW, 1, 2. CONTRACTS, 1. CORPORATIONS, 1. COUNTY JUDGE, 1, 2. CRIMINAL LAW, 22. DEEDS, 2. EJECTMENT, 2, 3. ELECTIONS, 1, 4. FRAUDS, STATUTE OF. GRAND JURY. GUARDIAN AND WARD, 1. HOMICIDE, 2, 3, 6, 7. INSURANCE, 1, 2. INTOXICATING LIQUORS. JUSTICES' COURTS, 3, 4. LIENS, 2, 5, 8–11. LIMITATION OF ACTIONS. MANDAMUS, 2. MASTER AND SERVANT, 11. MORTGAGES, 6. MUNICIPAL CORPORATIONS, 1, 2. PARTITION, 1–3. PHYSICIANS AND SURGEONS. PLEADING, 3, 4. QUO WARRANTO. REFERENCE, 2, 3. TAX TITLES. VENUE, 1–5.

2. In the construction of a statute it should be considered first from the viewpoint of good faith, common sense, and impartiality, and formal rules of interpretation should be invoked only when doubts otherwise unsolvable arise. *Niezorawski v. State,* 166

General law: Applicability to cities under special charters. See INTOXICATING LIQUORS, 1, 2. MUNICIPAL CORPORATIONS, 2.

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SUBROGATION.

See PLEADING, 5.

1. One who advances money to pay off an incumbrance upon property under an agreement that he is to have security thereon will not be regarded as a mere volunteer, but will be subrogated to the rights of the original incumbrancer if his own security turns out to be defective and there are no intervening equities. *Hughes v. Thomas*, 315

2. The widow of a testator was given a life estate in land and became executrix of the will. The personal estate was insufficient to pay debts, and in order to obtain money to pay off an overdue mortgage on the land she gave to another person a new mortgage which was intended and understood to cover the fee and not merely her life estate. No equities having intervened, the new mortgagee is *held* entitled to be subrogated to the rights of the original mortgagee. *Conner v. Welch*, 51 Wis. 431, and *Watson v. Wilcox*, 39 Wis. 643, distinguished. *Ibid.*

3. The right to subrogation in such a case is not barred by mere delay short of the statutory period of limitation, in the absence

of an equitable estoppel, no rights of third persons being prejudiced by the delay. *Ibid.*

4. Relief by way of subrogation in favor of one who has paid the debt of another should not be granted unless the necessity for it be clearly shown. *Reddington v. Franey,* 518

5. Plaintiff bought the interest of one partner and with the other formed a new firm. He advanced money for the purpose of discounting bills of the new firm, but his partner secretly used it to pay the debts of the old firm. *Held,* that the new firm was the owner of the money so used, and plaintiff's right, if any, must be worked out by subrogation of the new firm to the rights of the creditors whose claims were so paid, rather than by subrogation of the plaintiff personally. *Ibid.*

6. A complaint in such case which did not show the relations and rights of the partners in either firm as between themselves, or that, even if the new firm was largely indebted to plaintiff, he could not secure repayment of his advances by dissolution and settlement of its affairs, did not state a cause of action for subrogation. *Ibid.*

7. The partner who was a member of both firms, and who was made a defendant in the action, was not a necessary party plaintiff; nor was it essential that the creditors of the old firm, whose claims had been paid, should be joined as defendants. *Ibid.*

SUPREME COURT. See APPEAL AND ERROR. CRIMINAL LAW, 22.

SURETYSHIP AND GUARANTY. See HUSBAND AND WIFE, 1. PRINCIPAL AND AGENT, 2. PRINCIPAL AND SURETY.

SURFACE WATER. See WATERS.

TAXATION.

Assessment: County supervisor of assessment. See CONSTITUTIONAL LAW, 3-9.

Sale of lands for taxes. See TAX TITLES.

TAXPAYERS' ACTION. See QUO WARRANTO.

TAX TITLES.

See COUNTIES, 3. EJECTMENT.

1. A tax deed reciting that "W., assignee of the several tax certificates, as stated below, has deposited sixteen certificates," etc.; containing a partial transcript of the certificates, giving descriptions of the lands, amount of the tax on each tract, and after each description the name of a person under the heading "Buyer of certificate at tax sale;" and further reciting that said tracts were separately sold for the nonpayment of taxes "to the said several purchasers," is *held* to be in substantial compliance with sec. 1178, Stats. (1898), and to show sufficiently that W. was the assignee of the original purchasers or intermediate owners of the certificates, and also who were the purchasers of the lands at the tax sales. *Doolittle v. J. L. Gates L. Co.* 24

2. Title under a tax deed is not cut off by a later tax deed based on a tax sale prior to that on which the earlier deed was based. *Ibid.*

3. In an action to quiet title to land, wherein plaintiff's claim was based on tax titles acquired either by the county or by plaintiff

subsequent to the tax titles claimed by defendants, or upon deeds from prior owners, and no trust chargeable upon defendants in favor of the county or plaintiff was alleged, plaintiff was properly not permitted to show illegality in the sale by the county of the tax certificates upon which defendants' tax deeds (recorded more than three years before the action was commenced) were issued, as a basis for a claim that defendants' title was held in trust for the county and for plaintiff. *Cole v. Van Ostrand,* 454

4. Sec. 1113, Stats. (1898), providing that the town treasurer's return of delinquent taxes shall be, "as nearly as convenient," in the form there given, is not mandatory; and although the form given shows a blank at the end for the treasurer's signature, the omission of such signature to the return itself does not render the tax sale based thereon void, where there is annexed to the return the affidavit of the treasurer declaring its correctness, as required by sec. 1112. *Ibid.*

5. When such return shows one amount under the heading "Total tax," and another amount under the heading "Five per cent. collection fees," and the sum of the two amounts is made the basis of the tax sale, it will be presumed that the sum so adopted is the correct total of the true tax and the legal collection fee. *Pinkerton v. J. L. Gates L. Co.* 118 Wis. 514, distinguished. *Ibid.*

6. Where the printer's affidavit of publication of the notice of tax sale was not transmitted to the county treasurer within six days of the last publication, under sec. 1132, Stats. (1898), the inclusion of the printer's fee in the amount for which land was sold rendered invalid the tax certificate and the deed based thereon. *Ibid.*

7. The effect of the inclusion of such printer's fee in a particular case was not changed by the subsequent enactment of ch. 35, Laws of 1905, amending sec. 1132 so as to require merely that the printer's affidavit be transmitted on or before the date fixed for the tax sale, and validating payments of such fees theretofore made by counties. *Ibid.*

8. Under secs. 1186, 1187, Stats. (1898), when a tax deed, fair on its face and free from jurisdictional objections and those defined in sec. 1189, has been recorded for three years, a new legal title in fee simple is created in the grantee as against all the world. A later sale for nonpayment of subsequent taxes does not act upon any rights connected with the title preceding the established tax deed, but acts upon and cuts off, or fails to cut off, according to legality of the proceedings, merely the tax title created as above described. *Ibid.*

9. Sec. 1176, Stats. (1898), providing that a tax deed "shall vest in the grantee an absolute estate in fee simple" in the land described, refers only to *valid* tax deeds. *Ibid.*

10. Under secs. 1187, 1188, Stats. (1898), when the lands covered by a tax deed fair on its face have remained vacant and unoccupied at all times during the three years next succeeding the recording of the deed, the title of the grantee is not subject to attack for defects in the tax proceedings; and he may maintain ejectment against any person thereafter taking possession adversely to such deed. *Van Ostrand v. Cole,* 446

11. Failure to pay taxes does not of itself estop the owner of land to claim his rights as such owner. *Ibid.*

12. Ejectment may be maintained against a tax-title claimant, although there was no previous tender to him of the sums paid for taxes, interest, etc., which, under sec. 3087, Stats. (1898), he is to be reimbursed in case his title fails on account of defects in the tax proceedings; and failure to make such a tender does not affect the plaintiff's right to recover costs in the action from the defendant. *Ibid.*

13. Secs. 1191, 1191*a*, Stats. (1898), do not cure defects in tax proceedings and tax deeds based thereon or preclude any person from showing title and right of possession or from attacking any claim to land under tax deeds taken by the county for any defect or insufficiency rendering the deeds invalid. *Ibid.*

14. Although in a town treasurer's return of delinquent taxes the township, range, and section numbers which appeared at the top of the respective columns were not repeated or indicated by ditto marks after the description of each parcel of land, the descriptions are *held* sufficiently definite and to meet the requirements of sec. 1047, Stats. (1898). *Ibid.*

15. In the absence of proof to the contrary it will be presumed that the newspaper in which the notice of a tax sale was published was one meeting the requirement of sec. 1130, Stats. (1898), that it should have "been regularly and continuously published in such county once in each calendar week for at least two years immediately before the date of such notice." *Ibid.*

TENANTS IN COMMON. See PARTITION, 1, 2.

TENDER.
Of defense. See JUDGMENT, 1.
Of amount of taxes paid, etc. See TAX TITLES, 12.
Of conveyance. See VENDOR AND PURCHASER, 4.

TERM OF OFFICE. See COUNTY JUDGE, 3. OFFICERS.

TIMBER.
Exception or reservation of, in deed. See DEEDS, 3.
Conversion into money: Election by devisees. See WILLS, 4.

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When bond takes effect: Date or delivery? See PRINCIPAL AND SURETY, 3, 4.
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TITLE.
To land. See COUNTIES, 3. COVENANTS. DEEDS. EJECTMENT. HUSBAND AND WIFE. LIENS, 8, 9. MORTGAGES, 1. RAILROADS, 1–3. TAX TITLES. VENDOR AND PURCHASER.
To personal property. See BILLS AND NOTES, 5, 6. COUNTIES, 2. GIFTS.

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TOWN TREASURER. See TAX TITLES, 4, 5, 14.

TRANSCRIPT of judgment. See LIMITATION OF ACTIONS, 2, 3.

TRIAL.

Place of trial. See VENUE.

Continuance. See CONTINUANCE.

Trial of actions together: Stipulation.

1. After it had been stipulated by the parties that two actions should be tried together, the pleadings were amended and new issues introduced. On suggestion by the court of the difficulty of trying the cases together, plaintiff's attorney in one of them stated that he was willing to have it tried separately, and it was so tried. *Held*, that as against plaintiff there was no error in such separate trial contrary to the stipulation. *Fowler v. Metzger S. & O. Co.* 633

Reference: Long account, etc. See REFERENCE.

Examination of jurors. See JURY.

Arguments and conduct of counsel.

2. In an action upon a contract for the sale of screenings thereafter to be produced in plaintiff's flour mill, where the court had excluded samples offered in evidence as having been shown to defendant when the contract was made, remarks of defendant's counsel in his argument to the jury, commenting on plaintiff's efforts to exclude such samples from the observation and consideration of the jury, are *held* improper; but the trial court having promptly suppressed such comments, commanded counsel to confine himself to the evidence which had been admitted, and ruled that the jury had no right to infer what such samples might be, and having thereafter decided that plaintiff was not so prejudiced that a new trial should be granted, this court does not deem such conduct of counsel a ground for reversal. *Listman Mill Co. v. Miller,* 393

3. Remarks of plaintiff's counsel in argument to the jury, referring to his client's poverty, and other remarks apparently intended to prejudice and inflame the jury against defendants, are criticised, but whether by themselves they would necessitate a reversal is not decided. *Lyttle v. Goldberg,* 613

4. In an action against a village for injuries from defects in a sidewalk of which it was claimed the street commissioner had actual notice, the reading to the jury, by plaintiff's counsel in the course of his argument, of sec. 909, Stats. (1898), relating to the duty of street commissioner, is *held* not a prejudicial error. *Bereiter v. Abbotsford,* 28

Taking case or question from jury. See APPEAL, 18. BROKERS, 2, 5. EXECUTORS. FRAUD. MALICIOUS PROSECUTION. MASTER AND SERVANT, 19. NEGLIGENCE. RAILROADS, 4, 6, 7, 9, 15.

5. The construction of a written contract, when not dependent upon extrinsic facts as to which the evidence is conflicting, is a question of law for the court. *Wm. S. Merrell Chemical Co. v. A. Spiegel Co.* 272

6. The question whether the maker of a note owned by a decedent was a party to a fraud through which a payment was made to the widow instead of to the executor, so as to preclude a recovery by such maker from the widow, is *held* upon the evidence to have been one for the jury. TIMLIN and SIEBECKER, JJ., dissent on the ground that the right to have such question

submitted to the jury had been waived by not including it in the form of special verdict presented to the court, and otherwise. *Paulus v. O'Neill,* 69

7. Where, under a counterclaim for damages in an action for purchase price of goods, there was evidence of breaches of the contract by plaintiffs but no evidence of damage, there was nothing to submit to the jury as to such breaches. *Main v. Procknow,* 279

Withdrawal of evidence from consideration of jury. See EVIDENCE, 10.

Instructions to jury. See APPEAL, 2, 3. CRIMINAL LAW, 10–16. DAMAGES, 4, 5. EVIDENCE, 10. MASTER AND SERVANT, 12, 13, 18, 25. PRINCIPAL AND AGENT, 3. RAILROADS, 11–15.

8. Instructions given with reference to a question submitted for special verdict covering the matter of plaintiff's contributory negligence or assumption of the risk are *held* not objectionable as informing the jury of the effect of their answer to the question. *Horn v. La Crosse Box Co.* 384

9. The fact that the jury were instructed to answer questions in the special verdict one way or another accordingly as they adopted the "claim of the plaintiff" or "the claim of the defendants" does not necessarily require a reversal where it appears that the jury must have understood the effect of their answers without any such suggestion; but such method of instruction is not to be approved. *Lyttle v. Goldberg,* 613

10. Nor does a reversal necessarily result from the fact that in respect to one question the court by mistake ascribed plaintiff's contention to the defendants, and defendants' to the plaintiff. *Ibid.*

11. Refusal to give a requested instruction as to evidence of a contract is *held* not to have been error in view of instructions given and other rulings on the subject. *Anderson v. Arpin H. L. Co.* 34

12. The jury having been instructed that the burden was upon plaintiff to prove that there was a contract and that it was as claimed by him, and that unless they found from the preponderance of the evidence that the minds of the parties met as to making a contract and all the terms thereof they should find for defendant in that regard, it is *held* that the case was not submitted to the jury on the theory that a contract for a stipulated rate of compensation was made and that it was for them to determine merely what that rate was. *Ibid.*

13. An instruction to the jury that as to a certain question the burden of proof was upon the defendant was not misleading, the jury knowing the positions taken by the respective parties with reference to that question. *Logeman Bros. Co. v. R. J. Preuss Co.* 122

14. Instructions defining burden of proof and preponderance of evidence are *held* not erroneous as being self-contradictory, illogical, or misleading. *Ibid.*

15. An instruction to the effect that the jury should find the plaintiff guilty of negligence if the evidence "satisfies" them that he failed to exercise reasonable diligence, etc., was not erroneous because of the use of the word "satisfies," it being apparent that it could not have been misunderstood by the jury. *McKone v. Metropolitan L. Ins. Co.* 243

Verdict: Negligible error in amount. See APPEAL, 14.

Same: In criminal action: Compromise. See CRIMINAL LAW, 21.

Special verdict. See MASTER AND SERVANT, 14, 26. MUNICIPAL CORPORATIONS, 5. SALES, 4. TRIAL, 6, 8–10.

16. A statement by the trial judge, in submitting questions for a special verdict in an action at law, that they are submitted for the purpose of aiding him to better determine what the final judgment in the case should be, is *held* not to inform the jury that their verdict would be merely advisory. *McKone v. Metropolitan L. Ins. Co.* 243

17. Refusal to submit in a special verdict a question as to whether defendant would have suffered any loss if plaintiff had not been guilty of negligence, was rendered immaterial by answers to other questions to the effect that plaintiff was not negligent. *Ibid.*

18. Where a special verdict covered the question of defendant's negligence and included a finding that such negligence was the proximate cause of plaintiff's injuries, refusal to submit other questions as to whether the injuries were not the result of unavoidable accident was not error. *Hocking v. Windsor S. Co.* 532

19. Itemization of unliquidated damages by separate questions in a special verdict is, as a general rule, unnecessary; and the refusal to submit such separate questions in an action for loss of services of an infant son is *held* to have been within the discretion of the trial court. *Johnson v. St. Paul & W. C. Co.* 627

Judgment. See JUDGMENT.

New trial. See NEW TRIAL.

TRUSTS AND TRUSTEES. See TAX TITLES, 3. VENDOR AND PURCHASER, 8.

VACANCY in office. See COUNTY JUDGE, 1–3. ELECTIONS, 2.

VALUE: Evidence. See EVIDENCE, 2–5. RAILROADS, 2.

VARIANCE. See MASTER AND SERVANT, 20.

VENDOR AND PURCHASER OF LAND.

See COUNTIES, 3. COVENANTS. DEEDS. MORTGAGES, 1.

1. A bilateral land contract purporting on its face to set out the mutual undertakings of the parties is presumed to be a complete expression of their final contract, and this presumption can be overcome, if at all, only by the clearest proof. *Foster v. Lowe,* 54

2. A land contract providing that if the purchaser shall fail to make any of the payments as stipulated the agreement "shall be thenceforth utterly void" and all payments thereon forfeited, "subject to be revived and renewed in writing at the option of" the vendor, gives to the vendor, after such failure. the right to declare the contract at an end or to sue for the unpaid purchase price or for specific performance. *Ibid.*

3. Commencement of an action for the purchase price and filing of the complaint is a sufficient declaration in writing of the vendor's election that the contract shall continue in force. *Ibid.*

4. Where by the terms of a land contract the purchaser agrees to pay the whole price absolutely and the vendor promises that

after such payment and upon demand a conveyance shall be made, the liability of the purchaser is absolute and no tender of conveyance or showing of ability to convey need either precede or accompany the recovery of the purchase price. *Ibid.*

[5. Whether in such a case there might be an equitable defense or counterclaim where it was shown that the vendor had disabled himself to convey and was insolvent, not determined.] *Ibid.*

6. The vendor in a land contract who assigns the contract or the right to the payments thereunder holds the legal title to the land in trust for the parties to the contract or, upon completion of the payments, for the purchaser alone, and such trust follows the legal title wherever it may go, except into the hands of a *bona fide* holder for value. *Ibid.*

7. Where the vendor in a land contract, having the option to declare the contract at an end because of default in payments, assigns the contract, such assignment carries with it the right to exercise said option, and the vendor cannot thereafter exercise it. *Ibid.*

8. Under a complaint alleging fraud in a sale of land by defendant to plaintiff and also a subsequent agreement between the parties by which defendant took an option upon the land and was to pay plaintiff all that he got for it in excess of a certain sum and also agreed to return the amount paid by plaintiff on the purchase price, there was no error in allowing plaintiff to elect upon the trial to proceed upon the theory of a contract to pay the sums mentioned. *Schamper v. Ullrich,* 524

9. Defendant's grantor, a corporation, knowing that there was no recorded conveyance of the title of H., a former owner of certain parcels of unoccupied land, but that other persons were executing conveyances thereof as if they owned them, obtained from the heirs of H. a quitclaim deed of the lands for a nominal consideration, the agent of the corporation falsely representing to said heirs that H. had lost his title by failure to pay taxes, and the heirs stating that they had no title. *Held,* that the corporation had information sufficient to put an ordinarily prudent man upon inquiry as to the rights of those claiming under a prior unrecorded conveyance from H., and was therefore not a *bona fide* purchaser. *Mississippi River L. Co. v. Blue Grass L. Co.* 10

10. Upon the evidence it is *held* that the defendant (also a corporation) when it purchased said lands was chargeable with notice of such unrecorded deed. *Ibid.*

VENUE.

1. A motion for a change of the place of trial, under sec. 2621, Stats. (1898), must be based upon a proper demand therefor. *Anderson v. Arpin H. L. Co.* 34

2. The demand for a change of the place of trial under sec. 2621, Stats. (1898), should be, in form, that the trial be had within "the proper county," naming it and stating why that is the only proper county or, where there is more than one such county, naming them and stating the reasons why the action is properly triable therein. *Ibid.*

3. A demand for a change of the place of trial to the county in which the defendant corporation was situated and had its principal office and place of business, not stating that that was "the

proper county" or that the cause of action wholly arose therein, was insufficient because, under sec. 2619, Stats. (1898), if the cause of action or some part thereof arose in another county, the action was also properly triable in such latter county. *Ibid.*

4. That part of sec. 2625, Stats. (1898), which provides that if the application for a change of venue be made after any continuance in the action obtained by the party applying for such change it shall be granted only upon payment of certain costs, but that no costs for attendance of witnesses shall be included if notice of the application, etc., shall have been served ten days before the commencement of the term, is not applicable where no continuance was obtained prior to the application for change of venue; and in such case fees for the attendance of witnesses at that term are a part of the costs, if any, recoverable by the prevailing party. *American F. & F. Co. v. Board of Education,* 220

5. Error in denying an application for a change of venue on account of the prejudice of the judge was cured or should be disregarded under sec. 2829, Stats. (1898), where such judge on his own motion procured the transfer of the cause to another branch of the court, presided over by another judge. thus giving defendant the relief to which he was entitled on his application. *Murphy v. State,* 420

6. In an action by a father for loss of services of his infant son disabled through defendant's negligence it was stipulated that all issues except as to the amount of damages should abide and be determined by the result of an action by the infant based on the same negligent acts, and that if the infant should recover in said action the parties to the action by the father should try and submit the question of the amount of damages "in the above-entitled court," in which the action by the father was pending. Afterwards, in the latter action, defendant filed an affidavit of prejudice of the judge for the purpose of applying for a change of the place of trial or the calling in of another judge, and thereupon, on defendant's motion, the cause was sent to another court for trial. *Held*, that defendant could not be heard to object that the last-named court had no jurisdiction to try the case because of the stipulation. *Johnson v. St. Paul & W. Coal Co.* 627

VERDICT. See CRIMINAL LAW, 21. TRIAL, 16–19.

VESTED RIGHTS. See MUNICIPAL CORPORATIONS, 3.

VILLAGES. See COURTS, 2. MUNICIPAL CORPORATIONS, 5.

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WAIVER.
Of right to rescind. See CONTRACTS, 12.
Of objections to charge. See CRIMINAL LAW, 11. MASTER AND SERVANT, 14.
Of defects in process. See JUSTICES' COURTS, 2.
Of subcontractors' rights. See LIENS, 4.
Of omissions from special verdict. See MASTER AND SERVANT, 14.
Of agreement releasing damages, etc. See RAILROADS, 3.
Of stipulation. See TRIAL, 1. VENUE, 6.
Of right to have question submitted to jury. See TRIAL, 6.

WARRANTY. See COUNTIES, 2. SALES.

WATERS.

1. The common-law doctrine as to the right of a landowner to protect his premises from surface water and to rid the same thereof in a reasonable way, even though consequential injuries may thereby be caused to other lands, is the law of this state, subject only to the limitation declared in *Pettigrew v. Evansville*, 25 Wis. 223, that one landowner cannot rightfully collect surface water on his premises in a reservoir and then discharge the same directly upon or near to the lands of another so that it will reach such lands in a large volume to the material injury thereof. *Shaw v. Ward*, 646

2. The mere change of the surface of one's premises where reasonably necessary to cause surface water to flow therefrom by the natural course of drainage, even to the extent of causing it to pass to adjoining lands in a ditch, is not an accumulation of water and casting of it upon adjoining land within the doctrine of *Pettigrew v. Evansville, supra.* *Ibid.*

3. Defendants' lands contained a basin or depression to which surface waters from surrounding lands as well as their own flowed and in which, under natural conditions, such waters were to some extent retained except when, in periods of drouth, they evaporated or were absorbed into the ground. When the waters in the basin reached a certain height they overflowed through an old ditch or draw across defendants' lands and the lands of others (including plaintiffs) to a creek some distance away. *Held*, that defendants had the legal right to prevent such accumulation and retention of surface waters on their land by causing the same, by such means as were reasonably necessary—such as the digging of a ditch or the deepening of the existing one,—to flow in the natural course of drainage to and upon adjoining lands, and for injuries to other lands caused by their so preventing subsequent accumulation of surface water on their own lands they are not liable. *Ibid.*

4. If there was any liability in such a case for injuries to the lands of plaintiffs caused by the discharge, at the time of opening a ditch into the basin, of the waters then accumulated therein, which passed to plaintiffs' lands across the lands of others in an artificial drain for which defendants were not responsible and at a time when plaintiffs were in the attitude of assenting to the existence of such drain and ditch as a town drain, such liability is not an independent ground for equitable interference nor enforceable in an action to compel a restoration of the former condition. *Ibid.*

WILLS.

Contract to bequeath: Consideration: Definiteness.

1. The privilege of naming a child is a sufficient consideration to support a contract to bequeath property to the child. *Freeman v. Morris*, 216

2. When the privilege of naming a child has been given by its parents to a third person in consideration of a contract by the latter for the benefit of the child, the child may afterwards ratify the transaction and enforce the contract. *Ibid.*

3. An agreement to devise or bequeath something to a person, no particular property or sum being specified, is invalid for indefiniteness and uncertainty; and such infirmity is not removed by subsequent statements, made to third persons by the person so agreeing, that he was going to bequeath a certain sum, nor by wills executed by him containing a bequest of that sum, where such wills were revoked by a later will wholly omitting such bequest. *Ibid.*

Conversion of realty into money: Growing timber: Election by devisees.

4. A will directed the conversion of testator's real estate into money, but certain growing timber which had been excepted from a grant by him of the land on which it stood, not being treated by the executrix as the testator's property, was not so converted. The devisees entered upon the land, claimed the timber as their property, and removed a portion of it; and some of the devisees conveyed their interests in the timber to another of them. *Held*, that this was an effectual election by the devisees to treat and hold the timber as real property. *Williams v. Jones*, 361

WITNESSES.

Competency. See PHYSICIANS AND SURGEONS.

Examination: Leading questions.

A question asked by plaintiff's counsel of a witness for plaintiff: "Counsel [for defendant] has asked one or two questions . . . in which it was assumed that plaintiff undertook to manufacture those attachments and fit them to the machine so that the machine would perform, or be able to perform, the work in question. Was there such an undertaking on the part of the plaintiff?" is *held* objectionable as leading and calling for a conclusion. *Logeman Bros. Co. v. R. J. Preuss Co.* 122

Impeachment: Corroboration. See CRIMINAL LAW, 16.

Fees for attendance. See VENUE, 4.

WORDS AND PHRASES.

As nearly as convenient, in statute. See TAX TITLES, 4.
Caring for person, in charge to jury. See DAMAGES, 4.
Clerk of the court of such county, in statute. See GRAND JURY, 1.
Consent to improvement, in statute. See LIENS, 2.
Conveyance, in statute. See DEEDS, 2.
County officers, in constitution. See CONSTITUTIONAL LAW, 3, 4.
Cumulative evidence. See NEW TRIAL, 2.
Exception from grant. See DEEDS, 3.
Excusable homicide. See HOMICIDE, 7.
Full and fair statement of all the facts. See MALICIOUS PROSECUTION, 3.
Furnishing, of materials, in statute. See LIENS, 5-7.
Great prejudice to the owners, in statute. See PARTITION, 3.
Holder in due course. See BILLS AND NOTES, 6.
In court, in justice's docket. See JUSTICES' COURTS, 1.
Involuntary killing, in statute. See HOMICIDE, 2.
Justifiable homicide. See HOMICIDE, 6.
Keeping the stock up, in contract. See MASTER AND SERVANT, 4.
Long account, in statute. See REFERENCE, 3.
Municipal court, in constitution. See LIMITATION OF ACTIONS, 1.

Obviously dangerous. See MASTER AND SERVANT, 17.
Or (meaning *and*), in statute. See MUNICIPAL CORPORATIONS, 1.
Persons, in statute. See CORPORATIONS, 1.
Pertains to a county, in statute. See QUO WARRANTO, 2.
Probable cause. See MALICIOUS PROSECUTION, 2, 3.
Required by the general law, in statute. See INTOXICATING LIQUORS, 3.
Reservation from grant. See DEEDS, 3.
Sale of goods, in statute. See FRAUDS, STATUTE OF.
Satisfies the jury, in charge. See TRIAL, 15.
Selected to meet the wants, etc., in contract. See SALES, 5.
Taking of property for public uses. See MUNICIPAL CORPORATIONS, 4.
Tax deed (meaning *valid* tax deed), in statute. See TAX TITLES, 9.
Timber, in statute. See LIENS, 10, 11.
Void, in contract. See VENDOR AND PURCHASER, 2.

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